No. 83355

IN THE
SUPREME COURT OF MISSOURI
EN BANC

CECIL CLAYTON,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of
Jasper County, Missouri
Honorable David Darnold, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 29.15 in the Circuit Court of Jasper County. Appellant was convicted

of murder in the first degree, ' 565.020, RSMo 2000, for which appellant was sentenced to death. This Court has jurisdiction over this appeal by virtue of the Court's July 1, 1988, standing order, adopted pursuant to Supreme Court Rule 83.06. that post-conviction appeals in death penalty cases be heard by this Court.

STATEMENT OF FACTS

Appellant, Cecil Clayton, was charged by information in the Circuit Court of Barry County, Missouri, with one count each of murder in the first degree, in violation of ' 565.020, RSMo 2000; and armed criminal action, in violation of ' 571.015, RSMo 2000 (L.F. 18-20)[1]. On defendant=s motion, venue was transferred from Barry County to Jasper County, Missouri (Tr. 1-2). Appellant=s case was tried to a jury in October of 1997, before the Honorable David Darnold (Tr. cover, 1).

The evidence adduced at trial, as summarized by this Court in **State v. Clayton**, 995 S.W.2d 468 (Mo. banc 1999), was as follows:

> Cecil Clayton and Martha Ball had been involved in a romantic

[1] Prior to trial, the armed criminal action charge was dismissed without prejudice (Tr. 605-607). The record on appeal cited in this brief consists of the trial transcript ("Tr.); the direct appeal legal file ("L.F"); the transcript of the 29.15 evidentiary hearing ("PCR TR."); the 29.15 legal file ("PCR L.F."); the appellant's 29.15 exhibits on appeal ("M.Ex"); the respondent's 29.15 exhibits on appeal ("St.Ex.").

relationship and had, at times, lived together. By November 1996, their relationship was coming to an end. On November 27, 1996, Martha asked Clayton to meet her at the Country Corner, a store in Purdy, Missouri. She requested that Clayton bring some important papers she had left at his home. Clayton arrived at the store without the papers. Clayton requested that Martha go with him to his home to obtain the papers but she refused. He left and returned with the papers. Clayton was driving his blue Toyota truck with wooden sides.

When Clayton returned with the papers he asked Martha to go out to eat with him. She refused. Clayton became angry, pushed her, and the two began to argue in the store. Barbara Starkey, an employee of the store, noticed the argument and called the Barry County sheriff=s department. Jim McCracken, Purdy chief of police, responded to the call and spoke with Clayton. He lingered in the store until after Clayton left. Martha asked Chief McCracken if he would escort her to Cassville where she was staying with her mother, Dixie Seal. Before Chief McCracken could arrange the escort, Martha left the store saying that she was going to a friend=s home. Martha then went to Vicki Deeter=s home in Monett. Vicky testified that Martha was very scared, pale, and shaking when she arrived at her home.

After leaving the Country Corner store, Clayton went to see his friend, Martin Cole, at around 9:40 p.m. Clayton asked Martin to go with him.

Martin declined because he had to drive a friend to work. Clayton became angry, raised his voice, and left.

Martha called Dixie Seal, her mother, at around 9:50 p.m. and advised her sister, Carolyn Leonard, that she was at Vicky=s home. Shortly thereafter, Carolyn heard a vehicle outside, its engine running roughly. She observed the vehicle stop, back into the driveway and turn its light off. Because there were lights across the top of the cab Carolyn surmised that the vehicle was a truck. She phoned Martha and verified that Clayton was driving the truck. Carolyn then telephoned the Barry County sheriff=s department and advised them that Clayton was on their property and was not welcome. Deputy Christopher Castetter was dispatched to the Seal residence. He contacted the dispatcher when he arrived at 10:03 p.m.

Ralph Paul, Dixie Seal=s neighbor, and his son-in-law, Greg Pickert, had also heard and seen the truck in Seal=s driveway. Ralph phoned Mrs. Seal to inquire about the truck. They described the vehicle as a truck because of the lights across the top and noticed that it was backed into the driveway and running roughly. Shortly thereafter Ralph and Greg went back outside. The truck was gone and the two noticed a car sitting at an angle with the engine running at a high rate of speed and the tires spinning.

Deputies David Bowman and Jason Manning also heard the dispatch regarding the Seal residence and decided to go by the area to assist Deputy

Castetter. When they arrived, at approximately 10:06p.m., Deputy Castetter=s patrol car was sitting at an angle against a tree in the driveway. The car=s engine was still running at a high rate and the tires were spinning and smoking.

Deputy Manning approached the driver=s side of the car. The window was rolled down about an inch, but was not broken. He put the car in park and turned off the engine. Deputy Castetter was leaned over in his seat. His seatbelt was not on; his weapon was still snapped in its holster; his flashlight was no longer secured in its cradle. Deputy Manning attempted to assist Deputy Castetter who was bleeding heavily from his head and having trouble breathing. Deputy Bowman contacted the dispatcher at 10:07 p.m and advised that an ambulance was needed.

Deputy Bowman went to Mrs. Seal=s home and spoke with Carolyn Leonard and Dixie Seal. Deputy Bowman then contacted the dispatcher and advised that Clayton was believed to have been driving the truck that had been in the driveway.

Deputy Castetter was transported to the hospital by helicopter. He had suffered a gunshot wound to the head, about the middle of his forehead. Despite medical treatments, Deputy Castetter died.

At about 10:10 to 10:15 p.m., Clayton returned to Martin Cole=s house. Clayton asked Martin accompany him, and the two left in Clayton=s truck. While in the truck Clayton asked Cole Awould you believe me, if I told you that

I shot a policeman, would you believe me?@ Clayton described how he shot the Acop@ in the head and how Deputy Castetter then hit the accelerator and hit a tree. Clayton then took the weapon out of his overalls, pointed it at Martin=s head, and threatened to shoot him. He asked Martin if he thought it was loaded. Clayton told Martin that he wanted him to act as an alibi and tell the police that the two had been together all afternoon and evening watching television.

At about 10:15 p.m. Chief McCracken heard a dispatch to be on the lookout for a blue Toyota truck with wooden sides driven by Clayton. McCracken recognized the description of the truck as the one driven by Clayton earlier that evening at the Country Corner store. McCracken met Chief Clint Clark of the Wheaton police department who had also heard the dispatch. The two confirmed Clayton=s home address and then went to his residence.

Clayton was driving toward his home when he saw the two police cars approaching. He parked in the driveway and asked Martin Ashould I shoot them?@ Martin answered no.

The officers activated their car spotlights, and Clayton eventually got out of his truck. The officers identified themselves. Clayton began walking toward the side of his house, advising the officers that he could not hear them. He kept his right hand in his pocket. Clayton refused to remove his hand or

approach the officers. He continued toward his house, placed something in a stack of concrete blocks, and returned to his truck. Martin complied with the officers= request to get out of the truck and was apprehended. Clayton was then apprehended and transported to the sheriff=s department. Martin advised the officers that Clayton had a gun. The officers located the gun in the stack of concrete blocks next to Clayton=s house.

Mike Rogers of the Missouri Highway Patrol interviewed Clayton. Clayton=s version of the events varied from complete denial to stating that Deputy Castetter Aprobably should have just stayed home@ and that Ahe shouldn=t have smarted off to me.@ Clayton then stated Abut I don=t know because I wasn=t there.@

Clayton, **supra** at 473-474.

At the close of the evidence, instructions, and arguments of counsel, appellant's jury found him guilty of murder in the first degree (Tr. 1685; L.F. 375). At the close of the penalty phase evidence, instructions, and arguments of counsel, appellant's jury recommended that appellant be sentenced to death for the murder of Deputy Castetter, finding as a basis for consideration of capital punishment 1) that appellant was convicted of the offense of assault in the second degree on June 15, 1992, in the Circuit Court of Lawrence County, 2) that Castetter was a peace officer and the murder was committed during the exercise of his official duty, and 3) that the murder of Castetter involved depravity of mind and was outrageously and wantonly vile, horrible and inhuman, that the

selection of the victim was random and without regard to the victim's identity, and that the killing thereby exhibited a callous disregard for the sanctity of all human life (Tr. 1864-1865; L.F. 395).

On December 1, 1997, appellant was sentenced, in accordance with the jury's recommendation, to death for the murder of Deputy Castetter (Tr. 1872, 1877). This Court affirmed appellant's convictions and sentences in **State v. Clayton**, **supra**.

On October 22, 1999, appellant timely filed a pro se Supreme Court Rule 29.15 motion for postconviction relief in the Circuit Court (PCR L.F. 1, 6-11). The Circuit Court appointed counsel, and counsel filed a timely amended motion on January 31, 2000 (PCR L.F. 19-118). Appellant alleged, *inter alia*, that his trial counsel was ineffective for presenting inconsistent defenses, failing to thoroughly investigate and present the diminished capacity defense that was advanced at trial, failing to challenge his competency to proceed at trial, and failing to call several penalty phase witnesses (PCR L.F. 36-76,84-93). Thereafter, the motion court held an evidentiary hearing on appellant's claims (PCR Tr. 1).

At the evidentiary hearing appellant presented the testimony of his trial counsel, Ross Rhoades and Christine Rhoades, as well as that testimony of Patrick Berrigan, the attorney who assisted his trial counsel during voir dire and who also had represented appellant in this matter before Mr. Rhoades entered his appearance (PCRLF. 635, 743, 832). He also presented the testimony of Dr. Daniel Foster, Dr. Bettye Back-Morse and Jeffrey Tichenor in support of his diminished capacity and competency to stand trial claims

(PCR Tr. 175, 508, M.EX.1). In addition, appellant presented the testimony of Carolyn Dorsey, Leslie Paul, Delores Williams, Carl Geisendorfer, Arnold Ray Evans, and Norma Mitchell in support of his claim that his attorney failed to call certain mitigation witnesses during the penalty phase and in support of his diminished capacity phase during the guilt phase (PCRLF. 19, 89, 546, 572, 602). Appellant also filed numerous exhibits, including his social security file, and jail records (Mov. Ex. 1, 3, 4, 7, 8, 10, 12, 19, 21, 22, 30, 31, 33, 34, 35, 36, 37).

The Circuit Court issued findings of fact and conclusions of law denying appellant's Rule 29.15 motion on December 19, 2000 (PCR L.F. 125-169). Appellant brings this timely appeal from the circuit court's judgment denying him post-conviction relief (PCR L.F. 174).

POINTS RELIED ON

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING , AFTER AN EVIDENTIARY HEARING, APPELLANT=S RULE 29.15 CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR PRESENTING AINCONSISTENT THEORIES@ OF DEFENSE AT TRIAL, CONSISTING OF REASONABLE DOUBT AND DIMINISHED CAPACITY THEORIES, BECAUSE APPELLANT CANNOT SHOW THAT HIS COUNSEL WAS INCOMPETENT OR ESTABLISH STRICKLAND PREJUDICE IN THAT (1) COUNSEL THOROUGHLY INVESTIGATED THE OPTIONS AND MADE A REASONABLE, STRATEGIC DECISION TO PRESENT SUCH THEORIES AND (2) APPELLANT DID NOT ESTABLISH THAT HIS COUNSEL=S ACTIONS AFFECTED THE OUTCOME OF THE TRIAL.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);

State v. Kinder, 942 S.W.2d 313 (Mo. banc 1996), **cert. denied** 522 U.S. 1854 (1997);

United States v. Jerome, 933 F.Supp. 989 (D.Nev. 1996);

Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989).

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT=S RULE 29.15 CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ADEQUATELY INVESTIGATE AND PRESENT VARIOUS EVIDENCE AND WITNESSES IN FURTHER SUPPORT OF THE DIMINISHED CAPACITY AND MITIGATION EVIDENCE PRESENTED AT TRIAL BECAUSE (1) COUNSEL WAS NOT INEFFECTIVE IN THAT COUNSEL=S ACTIONS WERE BASED UPON REASONABLE TRIAL STRATEGY AND (2) APPELLANT WAS NOT PREJUDICED IN THAT MUCH OF THE EVIDENCE WAS EITHER CUMULATIVE TO EVIDENCE PRESENTED AT TRIAL, INADMISSIBLE OR DAMAGING TO HIS THEORY AT TRIAL.

State v. Simmons, 955 S.W.2d 729 (Mo. banc 1997), **cert. denied** 522 U.S. 1129 (1998); **State v. Kreutzer**, 928 S.W.2d 854 (Mo. banc 1996), **cert. denied** 519 U.S. 1083 (1997); **State v. Clay**, 975 S.W.2d 121 (Mo. banc 1998), **cert. denied**, 119 S.Ct. 834 (1999); **State v. Chambers**, 891 S.W.2d 93 (Mo. banc 1994), **cert. denied**, 119 S.Ct. 2383 (1999).

III.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S RULE 29.15 MOTION, BASED UPON THE CLAIM THAT HIS TRIAL COUNSEL FAILED TO ADJUDICATE APPELLANT'S ALLEGED INCOMPETENCY TO PROCEED AT TRIAL BECAUSE COUNSEL MADE A REASONABLE AND STRATEGIC DECISION NOT TO CONTEST APPELLANT'S COMPETENCY TO PROCEED BASED UPON HIS CONCLUSION THAT APPELLANT UNDERSTOOD THE PROCEEDINGS AGAINST HIM AND COULD ASSIST IN HIS DEFENSE, AND APPELLANT COULD NOT HAVE BEEN PREJUDICED BY THIS DECISION IN THAT HE WAS IN FACT COMPETENT TO PROCEED.

State v. Richardson, 923 S.W.2d 301 (Mo. banc 1996), **cert. denied** 519 U.S. 972 (1996);

State v. Skelton, 887 S.W.2d 699 (Mo.App. S.D. 1994);

Hubbard v. State, 31 S.W.3d 25 (Mo.App. E.D. 1999);

State v. Simmons, 955 S.W.2d 729 (Mo. banc 1997), **cert. denied** 522 U.S. 1129 (1998);

IV.

THE MOTION COURT DID NOT CLEARLY ERR WHEN IT DENIED APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON THE GROUND THAT HIS TRIAL COUNSEL DID NOT CALL VARIOUS FAMILY MEMBERS AND FRIENDS, CAROLYN DORSEY, ARNOLD RAY EVANS, LES PAUL, NORMA MITCHELL, AND DELORES WILLIAMS AS MITIGATION WITNESSES IN THE PENALTY PHASE OF THE TRIAL BECAUSE APPELLANT FAILED TO PROVE THAT HIS COUNSEL ACTED UNREASONABLY AND APPELLANT WAS NOT PREJUDICED IN THAT SUCH TESTIMONY FROM THE PROPOSED WITNESSES WOULD HAVE BEEN CUMULATIVE TO THE TESTIMONY AND/OR HARMFUL TO THE THEORY PRESENTED AT TRIAL.

State v. Clay, 975 S.W.2d 121 (Mo. banc 1998), **cert. denied**, 119 S.Ct. 834 (1999);

State v. Clemons, 946 S.W.2d 206 (Mo. banc 1997), **cert. denied** 118 S.Ct. 416 (1997);

State v. Johnston, 957 S.W.2d 734 (Mo. banc 1997), **cert. denied** 522 U.S. 1150 (1998);

State v. Dixon, 969 S.W.2d 252 (Mo.App., W.D. 1998);

ARGUMENT

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING , AFTER AN EVIDENTIARY HEARING, APPELLANT=S RULE 29.15 CLAIM THAT HIS COUNSEL WAS INEFFECTIVE FOR PRESENTING AINCONSISTENT THEORIES@ OF DEFENSE AT TRIAL, CONSISTING OF REASONABLE DOUBT AND DIMINISHED CAPACITY THEORIES, BECAUSE APPELLANT CANNOT SHOW THAT HIS COUNSEL WAS INCOMPETENT OR ESTABLISH STRICKLAND PREJUDICE IN THAT (1) COUNSEL THOROUGHLY INVESTIGATED THE OPTIONS AND MADE A REASONABLE, STRATEGIC DECISION TO PRESENT SUCH THEORIES AND (2) APPELLANT DID NOT ESTABLISH THAT HIS COUNSEL=S ACTIONS AFFECTED THE OUTCOME OF THE TRIAL.

Appellant claims that he received ineffective assistance of counsel because his counsel presented Ainconsistent theories@ of defense at trial (App.Br.45). Appellant argues that his counsel=s Apresentation of mutually exclusive guilt phase theories was ineffective because it destroyed any chance of conviction of a lesser offense or recommendation of a life sentence by the jury (App.Br.46).

The Trial

At trial, the defense counsel, Ross Rhoades, stated during his opening statement that he would present evidence from two doctors and from a member of appellant=s family regarding appellant=s brain damage (Tr.989-993). He concluded by telling the jury that they

would have to determine what happened during the Abasically three short minutes@ when Deputy Castetter was shot and that they had to Aconsider the evidence, as a whole, to determine the innocence, or guilt, and [to] what degree of my client-@ (Tr.993).

During the state=s case-in-chief, Rhoades challenged the state=s evidence and witnesses on the following issues; whether appellant was at the scene of the crime, (Tr.1057-1058,1139-1141), whether the officers actually saw appellant hide the .38 caliber pistol in the pile of cement blocks, (Tr.1225-1226), whether the bullet recovered from the victim was Apositively@ identified as coming from the gun found in the cement blocks, (Tr.1365-1368), and whether the fact that paint transfer from appellant=s truck matching the victim=s vehicle was conclusive of appellant=s truck being the actual source of the paint (Tr.1387-1388). Rhoades additionally elicited testimony on the cross-examination of a Missouri Highway Patrol criminalist that appellant did not have gun residue on his clothing or hands and that Martin Cole did have gunshot residue on his left hand (Tr.1390-1391, 1395). He also elicited testimony that Cole was left-handed (Tr.1452).

For appellant=s guilt phase case-in-chief, Rhoades presented testimony from appellant=s brother recounting a sawmill injury appellant suffered in 1972 (Tr.1516-1530). Rhoades then presented testimony from Dr Bettye Back, a neuro-psychologist, who testified that due to appellant=s brain injury, appellant was not capable of deliberating or planning his behavior (Tr.1574). Rhoades also called Dr. Michael Morse, a neurologist, to testify about appellant=s Magnetic Resonance Imaging (MRI) brain scans (Tr.1605-1622). Dr. Morse stated that appellant was missing approximately 7.7% of his brain and he also

testified about appellant=s Afrontal lobe personality abnormality@(Tr.1604-1622).

During closing argument, Rhoades started by noting that A*if you find Cecil had an argument with his girlfriend*, Martha Ball, at this convenience store sometime that night, and *if you find he ended up out at his mother=s driveway that night in his truck*, he couldn=t have known that a deputy might be dispatched to come out and check on him@ (Tr.1653) (emphasis added). He went on to question whether appellant could have planned to kill a deputy under those circumstances (Tr.1653). Rhoades= argument then turned to evidence that was presented regarding appellant=s early childhood and his brain injury (Tr. 1654-1656). He noted Dr. Back=s testimony regarding appellant=s dementia and that appellant had an inability to plan, to deliberate, and that Amost importantly@ he Adidn=t have the capacity to cooly reflect upon anything, let alone the killing of another human being@(Tr.1657). He argued that A[t]his man is not intellectually capable of doing that@ (Tr.1657). Rhoades also went over Dr. Morse=s testimony and noted that in his opinion appellant was capable of suggestion (Tr.1658). Rhoades tied this susceptibility to appellant=s statements to the police (Tr.1658).

Rhoades then told the jury that any number of scenarios could have occurred on the night of the killing- appellant could have been there alone, with someone, or not at all (Tr.1660). He stated again that it was the state=s burden to prove beyond a reasonable doubt Awhat happened there that night and how Deputy Castetter was killed@ (Tr.1660). He explained the requirements for finding deliberation and for finding that the state proved its case beyond a reasonable doubt (Tr.1660-1663). He referred to the facts of this case as a

Amystery@ and a Apuzzle@ (Tr.1663). He continued this reasonable doubt theme by criticizing the state=s witnesses and challenging their credibility, including noting that Martin Cole=s left hand tested positive for gun residue and that appellant=s did not (Tr.1664-1672). Rhoades did not concede at trial that appellant was the shooter, nor did the doctors evaluating appellant testify that appellant was the shooter.

During the penalty phase of trial, counsel presented testimony from another of appellant=s younger brothers, Jerry Clayton, and a jail administrator and chaplain from the Jasper County jail to testify about appellant=s childhood, religious activities, changes in appellant after the sawmill accident, the manner in which he assists others in jail and that he has not been any trouble in jail (PCRTR.1795,1796-1800,1803-1813). In his closing argument, counsel argued that the jury must try to make the punishment fit the criminal (Tr.1846). He continued to argue that the jury should take into consideration his brain damage and the doctor=s testimony from the guilt phase (Tr.1846-1854).

Evidentiary Hearing

Rhoades testified at the evidentiary hearing regarding his theory of defense at trial (PCRTR.833). Rhoades explained his defense theory as follows:

> Well, number one, just put them to the proof, to prove beyond a reasonable doubt that he committed the crime. There was some evidence of gunshot residue on the companion when he was arrested. And secondly, diminished capacity defense

(PCRTR.833). Rhoades testified that it was not his defense that Martin Cole was the

shooter, but A[i]t was just that Cecil wasn=t the one@ (PCRTR.833).

Rhoades realized there was evidence supporting a diminished capacity defense and that he could use such evidence in both the guilt phase and penalty phase of trial so he retained Drs. Back and Morse to evaluate appellant (PCRTR.848-849). However, he also noted that appellant=s dementia was probably exacerbated by his use of alcohol and that juries Adon=t like to give you any slack because you are drunk@ (PCRTR.969).

When he obtained the gunshot residue evidence indicating that Cole tested positive but that appellant did not, Rhoades decided to pursue a reasonable doubt theory (PCRTR.834). He stated that even though both theories were inconsistent, he Adidn=t think it would be smart to just give up on reasonable doubt, and not require the State to put their proof on@ (PCRTR.849).

Rhoades testified that in virtually every major felony trial, he makes it a practice to present evidence before a mock jury, consisting of ten to thirty people he knew, but who were not closely associated with him (PCRTR.806,977,979). He had done so on six different occasions in the past and found it Aabsolutely helpful@ in giving him an objective view (PCRTR.978). In the case at bar, he presented the testimony and exhibits to the mock jury based on both the diminished capacity and reasonable doubt theories and a Asubstantial percentage@ stated that although they thought appellant killed Deputy Castetter, they would not vote to convict because they had reasonable doubt (PCRTR.807,980).

Rhoades stated that he decided to proceed with both theories despite the strong opposition from his daughter, Christine Rhoades and former public defender Patrick

Berrigan (PCRTR.748).[2] Berrigan, who had initially represented appellant before Rhoades had been retained, was later hired by Rhoades to assist with voir dire (PCRTR.635-639). Berrigan advised Rhoades not to pursue both theories because it would cause him to lose credibility with the jury (PCRTR.649,660,662,748). They had several heated discussions about it (PCRTR.649,662).

Rhoades stated that in any trial, he felt it is was job to hold the state to its burden of proof and to point out inconsistencies to the jury (PCRTR.970,973). He believed it was important because in his experience Asome juries can hang up on the silliest damn things@ (PCRTR.970-971). Here, Rhoades felt that because the gunshot residue evidence could not be explained, he would be Aremiss@ if he did not present the evidence to the jury (PCRTR.973). He also noted that he Asoft-pedal[ed]@ the reasonable doubt theory in favor of the diminished capacity theory (PCRTR.973).

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[2]Christine Rhoades testified that she assisted her father with the trial by checking police reports, drive times and conducting some depositions (PCRTR.743-744). Although she was Asecond chair@ at trial, she did not examine any witnesses and she was not in charge of trial strategy (PCRTR.745,779).

Rhoades also acknowledged writing a letter to Berrigan four days after appellant received the death sentence in which he stated that he realized he was Ainadequate and inept@ in trying to spare appellant the death sentence (PCRTR.854-855, M.EX.30). He stated in the letter that he was Aunwilling to listen@ and did not realize appellant=s chances of Asucceeding in the first phase were minimal@ (PCRTR.855). However, Rhoades testified that he felt very bad and upset after appellant was sentenced to death and that if he truly felt his performance was incompetent he would have informed the court (PCRTR.975-976).

Standard of Review

In order to prevail on a claim of ineffective assistance of counsel, a movant must establish by a preponderance of the evidence that his or her attorney made errors so grievous that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the errors committed denied the defendant a trial whose result was reliable. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial review of counsel's conduct is necessarily done in hindsight and must therefore be highly deferential, and the competence of counsel is "strongly presumed." **Id**., 466 U.S. at 689-690; *see also* **State v. Harris**, 870 S.W.2d 798, 814 (Mo. banc 1994), **cert. denied** 115 S.Ct. 371 (1994). On an appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." Supreme Court Rule 29.15(j). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. **State v. Taylor**, 929 S.W.2d

209, 224 (Mo. banc 1996).

The Reasonableness of Counsel's Actions

On the issue of whether the actions of Rhoades "fell below an objective standard of reasonableness," **Strickland v. Washington**, **supra**, 466 U.S. at 687-688, the motion court found as follows:

> Attorney Ross Rhodes testified that he was an Assistant Prosecuting Attorney, a judge, and had been in the private practice of law since 1975, primarily in the area of criminal defense. He had extensive experience in homicide litigation, experience in capital litigation jury trials and had utilized a diminished capacity defense in the past.
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> ***
>
> . . .Rhodes held the State to its burden of proof, pointed out inconsistencies in the evidence and presented a diminished capacity defense.
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> ***
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> A review of the transcript and records in this case clearly shows that trial counsel Ross Rhodes effectively represented Movant, educated the jury about diminished responsibility through his voir dire questioning, held the State to its burden of proof, and argued for life should his client ultimately be convicted.
>
> ***
>
> Movant's attorney devoted substantial time, effort and expense to

Movant's case. Trial counsel were well prepared and provided Movant with a skilled and competent defense. This point is denied.

(PCRTR.130,131,132,133,134).

The motion court was not clearly erroneous. It determined that after reviewing the evidence available, counsel Rhoades Aeffectively represented@ appellant by choosing to advance both theories of defense when he Aeducated the jury about diminished responsibility [and then proceeded to present evidence of diminished capacity], held the state to its burden of proof, and argued for life should his client ultimately be convicted A (PCRTR.132). As presented to the jury, the two defense theories were not necessarily mutually exclusive. Counsel never conceded to the jury that appellant was the shooter. Counsel=s strategy was to point out inconsistencies in the state=s case and argue that the state did not prove he shot the victim beyond a reasonable doubt *and* also argue that because of appellant=s brain damage he was not capable of deliberation.

Trial counsel, aware that he had some evidence of diminished capacity that he could pursue at trial, but yet also cautious of presenting such a defense as it was linked to appellant=s voluntary use of alcohol, decided that he should also hold the state to its burden of proof. Buttressed by the gunshot residue evidence indicating that Cole tested positive but that appellant did not, Rhoades believed he would have been Aremiss@ if he did not present such evidence to the jury. Using his years of experience, Rhoades reasonably believed that the gunshot residue evidence was the type of evidence that could create reasonable doubt.

Appellant argues, however, that such a belief on Rhoades= part Awas not a strategy; it was a gamble that was not based on a realistic evaluation of the state=s evidence@ (App.Br.57). This is simply not the case. Here, Rhoades not only relied on his years of experience in deciding on a defense theory, but he presented both alternative theories before a Amock jury@ in making his determination. He gathered a group of people and presented testimony and exhibits. A Asubstantial percentage@ of the jury were in favor of his reasonable doubt theory. AStrategic choices made after a thorough investigation relevent to plausible options are virtually unchallengeable.@ **State v. Kinder**, 942 S.W.2d 313, 336 (Mo.banc 1996), **cert. denied** 522 U.S. 1854 (1997).

Rhoades conducted a thorough investigation relevant to plausible options when he decided to pursue both theories. It was not unreasonable for counsel to not only offer the jury a theory on which to convict appellant of a lesser-included offense but to give the jury an opportunity to *acquit* appellant entirely by casting a bare suspicion on the state=s case-enough of a suspicion to create a reasonable doubt. This is particularly reasonable in light of Rhoades= past experiences with clients where the jury did get Ahung up@ on a Asilly thing@ (PCRTR.971).

Just as it is reasonable trial strategy for an attorney to decide on an Aall or nothing@ approach when deciding whether to request a lesser-included instruction in a homicide case, **Love v. State**, 670 S.W.2d 499, 502 (Mo. banc 1984), so too is it reasonable trial strategy for an attorney to decide to present alternative theories of defense. In fact, numerous jurisdictions have held that A[c]ounsel for a criminal defendant may, in the exercise of [his

or] her professional judgment, present inconsistent defense theories without running the risk that such tactics will later be deemed ineffective assistance of counsel.@ **United States v. Jerome**, 933 F.Supp 989, 996 (D.Nev. 1996) (counsel presented three theories of defense including entrapment and insanity); *see also* **Brown v. Dixon**, 891 F.2d 490, 494-495 (4th Cir. 1989) (counsel argued that defendant Aeither did not commit the murders or did so while drunk@); **Hunt v. Nuth**, 57 F.3d 1327, 1332 (4th Cir. 1995) (reasonable doubt and voluntary intoxication); **Jones v. Kemp**, 678 F.2d 929, 931 (11th Cir. 1982); **United States v. Salameh**, 54 F.Supp.2d 236, 253 (S.D.N.Y. 1999).

At any rate, A[t]he choice of defense theories is a tactical decision . . . a lawyer is not required by the Sixth Amendment to present a single, coherent defense theory.@ **United States v. Jerome**, 933 F.Supp. at 996.

Appellant makes much of the fact that former public defender Pat Berrigan and Rhoades= daughter had frequent, heated discussions with Rhoades advising him not to proceed with both theories (App.Br.47,48). However, the fact that there were heated discussions debating the options only underscores the fact that Rhoades was truly informed about his options when he made the final decision to go against their advice. Also, looking to a letter that was written four days after appellant received the death penalty, wherein Rhoades stated that he was Ainadequate and inept@ for not following Berrigan=s advice, only leads to engaging in hindsight review (App.Br.52,59). Hindsight review is precisely the sort of review **Strickland** discourages. At any rate, Rhoades stated that at the time he wrote that letter he was upset because appellant had just received the death sentence and that if he truly

felt his performance as an attorney was incompetent he would have notified the court.

Appellant=s reliance on **Ross v. Kemp**, 393 S.E.2d 244 (Ga.1990), as an instructive case on the issue of inconsistent defenses is misplaced (App.Br.54-55). Appellant claims that Athe court presumed prejudice, finding, >the presentation of a fractured defense . . . is evidence of ineffectiveness so pervasive that a particularized inquiry into prejudice would be unguided speculation=@(App.Br.54, *quoting* **Ross v. Kemp**, **supra** at 246). However, the Georgia Supreme Court did not find that presenting inconsistent defenses was so egregious to be considered ineffective, but rather the court found that A[t]he presentation of a fractured defense, *and the placement of petitioner on the stand with no preparation whatsoever* in a trial in which his life hung in the balance is evidence of ineffectiveness so pervasive that a particularized inquiry into prejudice would be unguided speculation.@ **Id**. (emphasis added). In **Ross**, the petitioner was represented by two attorneys, one retained and one appointed, who Aseemingly acted as lead counsel without informing the other of the direction of the defense was to take.@ **Id**. Each attorney advanced defenses Aat odds with that of the other, causing a discernable split within the ranks of the defense team . . .@ **Id**. Here, no such egregious behavior occurred. The decision to present both theories by Rhoades was his to make as lead counsel, and it was an informed strategic decision.

Prejudice

Appellant=s claim also fails because he has not established **Strickland** prejudice. As to whether appellant was prejudiced by counsel=s choice of defense theories, the motion court held as follows:

> Movant's allegation that "by the time the penalty phase was reached, counsel had no credibility with the jury" was not supported by evidence at the hearing, is speculative and is refuted by the trial transcript.
>
> ***
>
> The Movant has failed to present evidence that the outcome of his case would have been any different had his counsel taken the actions Movant asserts should have been undertaken. After reviewing the transcript and record, this Court finds the outcome would not have been any different.

(PCRLF.129,134).

Appellant argues, however, that Aonce Rhoades asserted that there was reasonable doubt that Clayton committed the homicide and tried to cast suspicion on Cole, the mitigation theory of mental illness lacked credibility@(App.Br.59). Yet, there was no evidence presented before the motion court to establish that but for counsel=s decision to advance a reasonable doubt theory in the guilt phase of the trial, the jury still would have accepted the diminished capacity evidence to the point where they would have found he could not deliberate or, in the penalty phase, sentence him to life.

At any rate, the same judge who presided over the trial, Judge David Darnold, was the same judge who presided over the post-conviction proceedings and he specifically found that Athe outcome would not have been any different@ (PCRTR.134). The motion court was not clearly erroneous.

Because counsel=s decision to hold the state to its burden of proof and to also

present a diminished capacity defense was based on a thoroughly investigated and informed trial strategy appellant has failed to establish that counsel=s actions were not reasonable. Further, appellant=s claim also fails because he failed to establish that he was prejudiced as a result of his counsel=s actions. Based on the above, appellant=s first point on appeal must fail.

II.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, AFTER AN EVIDENTIARY HEARING, APPELLANT=S RULE 29.15 CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ADEQUATELY INVESTIGATE AND PRESENT VARIOUS EVIDENCE AND WITNESSES IN FURTHER SUPPORT OF THE DIMINISHED CAPACITY AND MITIGATION EVIDENCE PRESENTED AT TRIAL BECAUSE (1) COUNSEL WAS NOT INEFFECTIVE IN THAT COUNSEL=S ACTIONS WERE BASED UPON REASONABLE TRIAL STRATEGY AND (2) APPELLANT WAS NOT PREJUDICED IN THAT MUCH OF THE EVIDENCE WAS EITHER CUMULATIVE TO EVIDENCE PRESENTED AT TRIAL, INADMISSIBLE OR DAMAGING TO HIS THEORY AT TRIAL.

As mentioned in Point I above, trial counsel made a reasonable, strategic decision to present a diminished capacity defense while also holding the state to its burden of proof through pointing out inconsistencies in the state=s evidence and arguing that there was reasonable doubt. Appellant claims, however, that his counsel Awas ineffective in the guilt and penalty phases for failing to present all of the available evidence in support of the diminished capacity defense and the mitigation theory based on Clayton=s brain injury (App.Br.62). Specifically, appellant contends that counsel was ineffective because :

(1) the jury was not aware that appellant never received rehabilitation therapy after his sawmill brain injury in 1972 or that he had other closed head injures;

(2) he did not present as evidence before the jury the Nevada State Hospital and

appellant=s Social Security Disability records;

(3) he did not present appellant=s school records or Aanecdotal@ evidence from appellant=s sister, Carolyn Dorsey and his best friend, Les Paul; and

(4) he did not present a Acoherent@ theory using the above information and Aintegrating@ it with the experts at trial

(App.Br.61).

Standard of Review

In order to prevail on a claim of ineffective assistance of counsel, a movant must establish by a preponderance of the evidence that his or her attorney made errors so grievous that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the errors committed denied the defendant a trial whose result was reliable. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On an appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." Supreme Court Rule 29.15(j).

In the context of counsel's performance, the selection of witnesses and the presentation of evidence are matters of trial strategy. **Leisure v. State**, 828 S.W.2d 872, 874 (Mo. banc), **cert. denied**, 506 U.S. 923 (1992); **State v. Richardson**, 923 S.W.2d 301, 327 (Mo. banc), **cert. denied**, 519 U.S. 972 (1996). On appeal, trial counsel's decision not to call a particular witness or present a particular piece of evidence is presumed to be based on trial strategy. **State v. Walton**, 899 S.W.2d 915, 922 (Mo.App., W.D. 1995). Thus, to demonstrate ineffectiveness for failing to present evidence, a movant

must establish at the evidentiary hearing, among other things, that the attorney's failure to present the evidence was something other than reasonable trial strategy. *See* **State v. Pounders**, 913 S.W.2d 901, 908 (Mo.App. S.D. 1996); **State v. Jones**, 921 S.W.2d 28, 34 (Mo.App., W.D. 1996). To prove **Strickland** prejudice in the context of death penalty sentencing, appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. **State v. Kenley**, 952 S.W.2d 250, 266 (Mo. banc 1997), **cert. denied**, 118 S.Ct. 892 (1998).

Factual Background

During the guilt phase at trial, appellant=s trial counsel, Ross Rhoades, called appellant=s younger brother, Marvin Clayton, who testified about appellant=s childhood and family life and who also testified about changes in appellant after suffering a brain injury in 1972 from a sawmill accident (Tr.1517-1530). Appellant also called Dr. Bettye Back, a clinical psychologist with a specialty in neurology, to testify about appellant=s brain damage. Dr. Back met appellant in July 1997, and conducted a series of neuropsychological tests known as the Halstead-Reitan battery of tests (Tr.1546-1552). She explained that the tests are used to measure organic brain injury (Tr.1552).

She started by explaining that his full scale IQ was 86, meaning that he was Aa bit@ below average and that he was mild to moderately impaired (Tr.1554). She stated that appellant=s memory problems were consistent with frontal lobe problems and that he showed damage to both hemispheres of the brain (Tr.1558). She also conducted two tests

which are designed to show whether a patient is malingering, meaning faking responses, and the results showed no signs that appellant was malingering (Tr.1559).

The academic tests she conducted showed that appellant was at a third grade reading and spelling level and at a fifth or sixth grade reading comprehension level (Tr.1561). Her tests also indicated that appellant had brain damage in the right hemisphere of the frontal area (Tr.1568). She stated that based on her entire evaluation, including interviewing appellant and getting family background she concluded with a reasonable degree of psychological certainty that appellant suffered from the mental disease or defect of dementia (Tr.1569-1570). She explained that a person with dementia has problems with executive functioning, meaning his ability to plan and organize (Tr.1570). People with dementia have problems controlling impulsive behavior and are not capable of coping with complex sequence of events and then responding appropriately (Tr.1570). Other characteristics include irritability, inappropriate behavior, aggressiveness and violent behavior (Tr.1570).

Dr. Back testified that appellant=s dementia had been persistent and ongoing since 1972 (Tr.1571). Also, she stated that alcohol excacerbated his problem (Tr.1572). She stated that in her opinion appellant did not have the ability to cooly reflect in his agitated state (Tr.1574). She did Anot believe that in that situation, he would have the ability to deliberate or plan his behavior@ (Tr.1574). She also stated that the degree in which a person=s brain can find new neural pathways and recover after such an injury depends on the kind of brain a person has, the kind of injury, age of the patient, and whether or not the

person received cognitive rehabilitation therapy (Tr.1580).

Dr. Back stated that she was asked to evaluate if appellant had brain damage and not to decide if he shot the victim or not (Tr.1589). As such, she did not consider the facts surrounding the murder in reaching her diagnosis (Tr.1596). She testified that her opinion would not change even if she had known that appellant had attempted to solicit an alibi from Martin Cole or that he told several people about his plans for escape (Tr.1588). She explained that such facts only further illustrated how his brain damage prevents him from appreciating the seriousness of his behavior and causes him to act with very poor judgment (Tr.1588-1591).

Rhoades also called Dr. Michael Morse, a neurologist, to explain the results of his evaluation of appellant and to show the jury MRI scans (Tr.1605). Dr. Morse saw appellant in August 1997 and ordered an MRI and an encephalogram (EEG) for appellant (Tr.1606-1607). He explained that during the 1972 sawmill accident, a piece of wood went through appellant=s brain (Tr.1610). The MRI scans were shown to the jury and Dr. Morse explained that the white area of the scans represented the area of appellant=s brain that was missing (Tr.1713). He concluded that approximately 7.7 percent of his brain was missing and explained that the brain does not regenerate (Tr.1720,1722). He diagnosed appellant with frontal lobe personality abnormality as a result of traumatic brain injury with a frontal lobe dysfunction (Tr.1718).

Consistent with Dr. Back=s testimony, he explained that frontal lobe injuries lead to irritability, restlessness, poor concentration, excessive emotionality, poor tolerance for

environmental changes and anxiety (Tr.1719-1720). Chief among the symptoms is impulsive behavior (Tr.1720). When asked by the state if people with the same injury can exhibit Atremendously@ different symptoms, Dr. Morse insisted that the symptoms he listed are Afairly classic@ for frontal lobe injuries (Tr.1724).

At the penalty phase, Rhoades called another of appellant=s younger brothers, Jerry Clayton, to testify about appellant=s church activities when he was younger (Tr.1796-1797). He explained that while appellant Apartied and drank@ when younger, he eventually became active in church and held revivals and acted as a pastor (Tr.1797). He said appellant became anti-social, never held a steady job, and started drinking again after the sawmill accident (Tr.1800).

Rhoades also called Jeffrey Carr, the jail administer for the Jasper County Sheriff=s department to testify about appellant=s good adjustment in jail (Tr.1795). He described the medications that appellant was taking while in jail (Tr.1795). He also stated that he had no problems with appellant (Tr.1795).

Finally, Rhoades called Thora Shaw, the chaplain for the Jasper County jail (Tr.1803). She observed appellant for a few months and never saw appellant cause trouble (Tr.1806). She said that appellant sang, was a self-styled evangelist, preached sermons to fellow inmates and encouraged them (Tr.1808-1809). She also testified that appellant was slow intellectually and that if appellant were allowed to live, he would be a benefit to the men in jail (Tr.1812-1813).

Discussion

Appellant now alleges that this evidence in support of appellant=s diminished capacity theory and his mitigation theory was insufficient. Appellant=s claim boils down to attacking counsel=s Afailure@ to further investigate and present a myriad of additional evidence in support of the diminished capacity defense that he insists would have dramatically improved Dr. Back=s testimony at trial, or perhaps evidence that could have been used to help another expert instead of Dr. Back. Appellant claims that counsel Adid not obtain all of the information necessary to a thorough assessment of Clayton=s ability to deliberate@ (App.Br.78).

A. Social Security Records

Prior to trial, Rhoades obtained appellant=s 658-page Social Security Disability benefit records (PCRTR.861,M.Ex.4). The file contained numerous psychological and medical reports and paperwork, and evidence of appellant=s high strung character prior to 1972. (M.Ex.4). After reading the summaries and reports from the doctors and physicians, Rhoades specifically selected some of the reports for Dr. Back=s use, including reports from Dr. Klinkerfuss and medical and hospital reports of the doctors who saw and treated appellant at the time of his sawmill injury (PCRTR.861, M.Ex.31).

Rhoades testified that in his experience, juries are skeptical of mental health defenses (PCRTR.877). Therefore, he wanted to keep the mental health issue simple for the jury (PCRTR.871). Rhoades= strategy for the diminished capacity defense thus entailed showing how appellant was a Apretty good old boy@ who never got into trouble prior to 1972, but then after his brain injury, where he lost 7.7 percent of his brain, appellant was

not the same person (PCRTR.871-872). In keeping with this simplicity, he called Dr. Morse at trial to show the jury the MRI scan that would actually provide a visualization of the missing portion of appellant=s brain (PCRTR.890). He noted how during the mock jury he used prior to trial was impressed with the MRI showing Athe big white spot up in his head@ (PCRTR.981).

As a result, Rhoades decided not to admit as evidence at trial, or consequently, give Dr. Back access to, the entire Social Security file because he was Aafraid@ of how thoroughly the state would cross-examine her with Ainconsistent@ reports showing appellant=s aggressive behavior prior to 1972 (PCRTR.863,875). He thought the prosecutor=s potential cross-examination of Dr. Back would Adilute@ his live testimony (PCRTR.875). Rhoades did not Awant to get into a contest, in front of the jury, swapping these reports back and forth@ (PCRTR.863).

As to this claim, the motion court found as follows:

> This Court has reviewed the voluminous file of records including P's #4 (Social Security file), P's #5, (Freeman Hospital Records), P's #7, (Nevada State Hospital Records) offered and received at the evidentiary hearing. The records themselves were not admissible in wholesale fashion under the Business Records Act in that portions of the records would be and are subject to individual objections of hearsay and relevance. But, assuming that the Court would have admitted all the proferred records into evidence, trial counsel's failure to offer the records does not mean that counsel was

> ineffective . . . Defense counsel chose to use the magnetic resonance imaging (MRI) scans showing that the Movant was missing part of his brain (Tr. 989-991, 1608-23). Trial counsel's decision to use these images during his case, in lieu of hundeds of pages of records was an attempt to keep the issues within the grasp of the jury and avoid a paper-war with the State which could have diverted the jury's attention. Finally, some of the proffered records are inconsistent with statements made by Movant to his own experts about his history and emphasize Movant's violent history, alcohol problems, and entanglements with the law prior to the 1972 injury. These are specific areas trial counsel tried to avoid.
>
> This Court finds that counsel was not ineffective for failing to present the Social Security file and records during the penalty phase of Movant's trial. Movant has made no showing that the outcome of the penalty phase would have been any different, had these records been offered and admitted and disseminated to the jury.

(PCRLF.145-146) (internal citations omitted). The motion court did not clearly err.

Trial counsel was not ineffective. Rhoades= decision not to admit the Social Security records into evidence at trial and/or supply the entirety of the records to Dr. Back was based on his carefully thought-out trial strategy. Rhoades stated that he wanted to keep the evidence simple for the jury and not subject Dr. Back to vigorous cross-examination regarding appellant=s aggressive acts prior to 1972. For example, in one of the

psychological evaluations, Dr. Jim Earls was skeptical of the degree of symptoms reported by appellant (PCRTR.299,M.Ex.4 at 55). He also stated that

> Mr. Clayton is willing to endorse a wide variety of psychiatric symptoms. He would admit to symptoms such as the various first rank symptoms of schizophrenia on direct questioning but when asked to describe what the sensations were like he could not do so. Such a readiness to overendorse symptomatology casts some questions upon the presence of these symptoms.

(M.Ex.4 at 55). Also, Dr. Clifford Whipple observed during one of his evaluations of appellant that Athere was no disturbances, delusions, or confusion in the thought processes@ (M.Ex.4 at 13). He concluded that his memory quotient from the Weschler Memory Scale test indicated that there was no significant impairment in memory functioning (M.Ex.4 at 13). He noted that appellant=s logical memory Awas quite good@ and his mental control Awas not significantly impaired@ (M.Ex.4 at 13). He concluded that his scores on the Memory For Design test Aare not consistent with an individual who suffers from an organic disturbance@ (M.Ex.4 at 13). In addition, Dr. Jack Eardley noted in his report that there was only a Apossibility@ of organic problems and reported from his general observation that appellant had improved since he had last seen appellant two years previously (M.Ex.4 at 49).

Given the disadvantages associated with introducing appellant's Social Security records, appellant has not shown that counsel's decision not to introduce those records was anything other than a reasonable trial strategy. **State v. Simmons**, 955 S.W.2d 729, 749-50

(Mo. banc 1997), **cert. denied**, 522 U.S. 1129 (1998) (counsel not ineffective for failing to present mental health mitigating evidence where expert's report also contained damaging information).

Even though there were other reports that could be considered favorable and consistent with Dr. Back=s diagnosis of dementia or if there were explanations that Dr. Back could give to explain away the inconsistent harmful reports (as Dr. Daniel Foster would do in his PCR testimony), it still would be precisely the sort of paper shuffling before the jury that Rhoades sought to avoid.

Also, as the motion court noted, the entirety of the records themselves would not be admissible in wholesale fashion under the Business Record Act. Some of the material and statements contained in the records are hearsay and would not be admissible. *See* **State v. Kreutzer**, 928 S.W.2d 854 (Mo.banc 1996), **cert. denied** 519 U.S. 1083 (1997); **State v. Nicklasson**, 967 S.W.2d 596 (Mo.banc 1998), **cert. denied** 525 U.S. 1021 (1998). For example, appellant cites to the Social Security file which contains reports discussing statements from appellant=s wife about appellant=s behavior and family history to the evaluating psychologist or doctor (M.Ex.4 at 18-20, 64-65). These statements by appellant=s wife in the reports would have been inadmissible hearsay in trial. Counsel is not ineffective for failing to introduce inadmissible evidence. **State v. Twenter**, 818 S.W.2d 628 (Mo.banc 1991). There can be no ineffective assistance of counsel for failing to bring in evidence that would be subject to a meritorious hearsay objection. **State v. Chambers**, 891 S.W.2d 93, 110 (Mo.banc 1994), **cert. denied**, 119 S.Ct. 2383 (1999). Therefore,

since these records contained inadmissible hearsay, trial counsel could not have been ineffective for failing to attempt to introduce these records at trial.

Finally, even if counsel was incompetent and the evidence could have been admitted, appellant has not demonstrated **Strickland** prejudice. The motion court specifically found that appellant has not demonstrated that the outcome of the penalty phase would have been different had the records been admitted (PCRLF.147). This is also true as to the guilt phase.

Despite what appellant would argue, there was overwhelming evidence of deliberation. William Rogers and Robert Compton, appellant=s cellmates, testified about appellant's admissions regarding the killing of Deputy Castetter (Tr.1459-1460,1476,1484-1485). Martin Cole testified that appellant admitted shooting a police officer in the head (Tr.1434). And Dr. Spindler, who performed the autopsy on Deputy Castetter, testified that, based upon the stippling, powder and soot on the wound, the shot to Deputy Castetter was delivered from within six inches of his head (Tr.1115-1116). "Deliberation," which is defined as "cool reflection for any length of time no matter how brief," ' 565.002(3), RSMo 2000, can be inferred from the circumstances surrounding the murder. **State v. Watson**, 839 S.W.2d 611, 616 (Mo.App., E.D. 1992). Appellant shot his victim in the forehead at pointblank range; this provided evidence of his deliberation.

Furthermore, any more additional evidence regarding appellant=s mental deficiencies would not have been credible in light of the evidence regarding his repeated attempts to cover up his crime. Appellant demanded that Martin Cole be his alibi and concocted a story

for Cole in this regard (Tr.1435-1436). When the police came to his home to apprehend him, appellant pretended that he could not hear the officers so he could buy himself enough time to attempt to hide his gun (Tr.1206-1210,1248-1253,1438-1440). When questioned by law enforcement, appellant denied involvement in the crime, and attempted, albeit clumsily, to proffer the alibi story he had fabricated and attempted to foist upon Cole (Tr.1281). The jury rejected appellant's diminished capacity defense for good reason -- his alleged inability to "coolly reflect" stands in stark contrast to his obvious ability to attempt to mislead police and evade detection.

Likewise, any additional evidence would not have changed the outcome of the penalty phase. First, the jury could look to the facts about the crime itself that were presented in the guilt phase. Appellant executed his hapless victim by shooting him in the forehead at pointblank range. Deputy Castetter did not even have a chance to remove his flashlight, much less his weapon, before appellant fired. Then there was the evidence presented by the state during the penalty phase. The state adduced evidence that appellant was on probation for an assault conviction from 1992 (Tr.1723-1749, 1756-1759). The state also showed that in 1965, after being stopped for speeding, appellant assaulted the officer who had stopped him (Tr.1761-1764).

Based on all this, appellant has failed to prove his claim as to the Social Security records.

B. Nevada State Hospital and Purdy School Records

Appellant=s school records admitted into evidence at the evidentiary hearing reveal

that he was an average to good student and that he had a 99 IQ in the eighth grade and a 88 IQ in the tenth grade (M.Ex.12). Appellant contends that Dr. Back needed these records because without them she was made to look Afoolish@ by the prosecutor during cross-examination (App.Br.70). Dr. Back stated that generally academic skills are considered long-term memory and not affected by frontal lobe injury, so therefore because of appellant=s current test results, she believed appellant must not have ever been a good student (Tr.1561-1562). The prosecutor then confronted Dr. Back with appellant=s brother=s testimony that appellant was a good student (Tr.1562). However, the confrontation was not so damaging as appellant would argue because Dr. Back effectively recovered by stating that if appellant was such a good student before and now he performed as low as he did, then he truly did lose quite a great deal of his mental ability (Tr.1578).

Also, Rhoades stated at the hearing that he was told by appellant=s mother and family that appellant was an above average student but that he did not think the school records were that important (PCRTR.899). Thus, Rhoades= decision not to present evidence of appellant=s school records was based on trial strategy and cannot be challenged. **State v. Pounders**, 913 S.W.2d at 908. Further, because it did not damage Dr. Back=s testimony to the degree that it would have changed the outcome of the trial, appellant has not shown prejudice.

Appellant also finds fault with counsel not admitting into trial his records from Nevada State Hospital (App.Br.78-79). Appellant asserts that the records would have assisted Dr. Back with her testimony in the guilt phase and would have humanized appellant before the jury in the penalty phase because the records show that appellant sought help for

his mental problems since 1974 (App.Br.91).

Although defense counsel could not recall why he did not use the Nevada State Hospital records, he admitted that the reports that are Aconsistent@ with Dr. Back=s diagnosis of dementia would have been helpful in mitigation (PCRTR.880-881). However, he qualified that statement by saying that Amaybe@ he would have wanted to use the consistent records, but it would still have depended on what else was in the records i.e. whether there was harmful evidence as well (PCRTR.881-882).

Again, admitting such records at trial would not have corresponded with Rhoades= strategy of keeping the issue simple and avoiding a paper war with the state. This is so because the state could have countered the Nevada State Hospital records with evidence from the same records showing that appellant was not interested in school, that in his younger days before the accident people irritated him and he did not like crowds, that he had a reputation for drinking and getting into fights, and that appellant had a high temper and was high strung since he was a teen (M.Ex.7,reports dated 7-25-74,7-29-74,8-22-74). This would have been evidence of the characteristics counsel was trying to say came *after* appellant=s 1972 accident and not before the sawmill injury. Thus, these records would have also been contradictory to counsel=s trial strategy.

At any rate, the motion court found that the outcome of the trial would not have changed had the records been presented to the jury at trial (PCRLF.147). As stated above, given the evidence of deliberation at the guilt phase and the aggravating evidence presented in the penalty phase, the outcome of the trial would not have changed. Thus, appellant

cannot show **Strickland** prejudice from counsel failing to present these records.

C. AAnecdotal@ Evidence

Appellant also claims that counsel should have called appellant=s sister, Carolyn Dorsey, and his friend, Les Paul, to testify at trial. Appellant argues that counsel Ashould have called lay witnesses who could have testified about what kind of person Clayton was before the sawmill accident and how he changed after the accident@ (App.Br.82). Again, appellant asserts that their testimony would have been helpful in both the guilt and penalty phase (App.Br.82).

1. Carolyn Dorsey

Carolyn Dorsey, appellant=s sister, testified at the evidentiary hearing that she moved away from Missouri in 1979 when she got married (PCRTR.19). She stated that they grew up poor and that her parents were hard workers who picked fruit (PCRTR.19). Their father was a wonderful but very strict man (PCRTR.27). Their parents had trouble expressing their love, but the children always knew that they were loved (PCRTR.30,32). She noted that their father was hard to please and that appellant was not his favorite child (PCRTR.33,35). She recounted how their father got upset one time because appellant picked green strawberries (PCRTR.35). She also noted that appellant had a conversion while in jail in 1968 and became religious and quit drinking (PCRTR.40-42).

After his sawmill accident, appellant became very quiet and lost his short-term memory (PCRTR.45). He also would become angry (PCRTR.46). She recounted an incident in 1981 where appellant backhanded her because of a misunderstanding between

her and appellant=s wife at the time, Connie (PCRTR.48-50). He hit her hard enough to chip her teeth and cut her lip (PCRTR.51). During that incident, he also Adrew back@ a fist on his mother as if he were about to hit her (PCRTR.51-52). Appellant also threw a lawn chair into another sister=s car and grabbed another sister by the hair (PCRTR.52). In 1990, he threatened Dorsey and her husband after she told appellant that she did not want him driving with her son while he was drinking (PCRTR.52-57). Appellant said, AWell, I can pull your husband=s heart out and hold it in my hand@ (PCRTR.57).

She also testified that appellant was Ahigh strung@ before the accident, but that he controlled it (PCRTR.69). She stated how appellant got into fights before the 1972 accident and that she heard about appellant being drunk and acting mean before 1972 (PCRTR.71). She noted that appellant had a change in personality when he quit drinking (PCRTR.72).

She further testified that during the trial she was living in Florida but that she did have contact with Rhoades over the phone and told him she was available (PCRTR.61-62). Rhoades stated that he vaguely remembers speaking with her (PCRTR. 902). She testified that Rhoades Ablew her off@ when she was in town for the trial (PCRTR.63). However, Rhoades stated that he was trying to avoid testimony like Dorsey=s where she said that their father did not abuse them and that appellant was always high strung and high tempered (PCRTR.988). He also would have avoided witnesses who would say that after the accident, appellant was okay when he was sober (PCRTR.986).

As to this claim, the motion court held as follows:

> Ms. Dorsey's testimony is largely cumulative of the testimony of

Marvin Clayton during the guilt phase of the case, and Jerry Clayton's penalty phase testimony.

Ms. Dorsey's testimony that Movant was violent before the 1972 accident is exactly what the trial counsel wished to avoid in the trial. Her testimony regarding Movant's violent behavior after 1972, when he was intoxicated does not provide Movant with any viable defense and only emphasizes that Movant became more violent when he voluntarily ingested alcohol. Therefore Ms. Dorsey's testimony would only have brought to light more episodes of voluntary intoxication coupled with violence, and would have been prejudicial. Ms. Dorsey's observations about trial counsel's attitude are not credible and are unsupported by evidence.

(PCRLF.140-141) (internal citations omitted).

As the motion court correctly noted, Dorsey=s testimony would not have helped appellant=s defense. Testimony about appellant=s violent and Ahigh strung= behavior prior to 1972 was precisely the sort of testimony he was seeking to avoid. Furthermore, her testimony regarding appellant=s religious activities and his change in behavior after the sawmill accident was cumulative to Marvin and Jerry Clayton=s testimony at the guilt and penalty phases of trial. "Defense counsel is under no obligation to present the defendant's background in mitigation in a death penalty case, and defense counsel certainly need not present cumulative evidence of his background." **State v. Clay**, 975 S.W.2d at 145; **State v. Richardson**, 923 S.W.2d 301, 329 (Mo. banc 1996), **cert. denied** 117 S.Ct. 403 (1996).

Appellant=s claim as to Dorsey not being called in support of his diminished capacity or mitigation defense must fail.

2. Les Paul

Les Paul testified at the hearing through the aid of an interpreter as he had partial hearing loss (PCRTR.89-90). Paul testified that he met appellant in 1967 when appellant=s son was born and when appellant was preaching in the Assembly of God church in Purdy, Missouri (PCRTR.91-92). He stated that appellant preached, sang songs, held revivals and had a sincere belief in the church (PCRTR.93-100). He saw him preach before and after the 1972 sawmill injury (PCRTR.102).

About two to three years after the accident he noticed a change in appellant (PCRTR.106). He noticed that appellant became confused, depressed, anti-social, and that he could not handle pressure (PCRTR.106-109). He also noticed that appellant=s temper rose after the accident (PCRTR.114). He recounted a story where he saw appellant assault his daughter=s married boyfriend (PCRTR.115-119). In the late 1980's and or early 1990's he helped appellant purchase a car (PCRTR.111). A few weeks before the killing, he noticed that appellant was depressed (PCRTR.120).

Paul did not attend appellant=s trial (PCRTR.124). He stated that Rhoades did contact him over the phone and he told him about appellant=s religious activities (PCRTR. 143). Rhoades asked if he could help appellant and Paul stated that he could Abe no help to him@ (PCRTR.126). He also stated that he did not think Rhoades was honest and he felt that Rhoades just wanted to get through the trial (PCRTR.125-126). Paul insists he would have

helped if Rhoades Areally would have been a little more, presenting himself a little bit better than what he presented@ (PCRTR.144). Rhoades asked appellant if he could say something good about appellant and Paul said he did not think he could help him (PCRTR.150).

Although Rhoades endorsed Paul as a witness for trial, he did not call him. He vaguely remembered talking with Paul (PCRTR.908). He stated that he would not want to call someone who said they could not say anything good about appellant (PCRTR.986).

At to this claim, the motion court held as follows:

> Les Paul's testimony is largely cumulative of testimony and opinions offered by Matrvin Clayton and Jerry Clayton during the trial regarding the accident, its effects, alcohol use and Movant's religious activities.
>
> Mr. Paul's testimony also highlights that Movant was able to function in life, continue his ministry, interact with people, perform religious ceremonies and preach at revivals. He began to decline into depression when his marriage dissolved and he resumed drinking alcohol. This was not consistent with attorney Rhodes' strategy of presenting expert and lay testimony that Movant had problems with control and could not function in life because of the brain injury sustained in the 1972 accident. Mr. Paul's illustration that the Movant needed help purchasing a motor vehicle in the early 1990's contrasts with the trial of John P. Hichman's testimony that Movant purchased the murder weapon in this case unaided in 1994 (Tr. T. at 1398-1401).

Finally, Mr. Paul admitted that he was not cooperative when Mr. Rhodes contacted him. This was to due to a hearing difficulty, as alleged by movant, but because Mr. Paul did not want to be involved with the case. (PCRLF.142-143) (internal citations omitted).

As the motion court noted, Paul=s testimony regarding appellant=s religious activities and the change in appellant was largely cumulative to the testimony of appellant=s brothers at the guilt and penalty phase of the trial. *See* **State v. Clay**, 975 S.W.2d at 145; **State v. Richardson**, 923 S.W.2d at 329. Thus, appellant cannot establish prejudice. Furthermore, when Rhoades contacted Paul, Paul stated that he could not be of any help or say anything good about appellant. If counsel believes that the witnesses' testimony would not unqualifiedly support the defense, the decision whether to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel. **State v. Jones**, 885 S.W.2d 57, 58 (Mo.App., W.D. 1994); *see also* **State v. Dixon**, 969 S.W.2d 252, 258 (Mo.App., W.D. 1998). Further, Paul admitted that he distrusted Rhoades and was not cooperative. Appellant=s claim as to Leslie Paul fails.

D. Dr. Daniel Foster

Appellant appears to be arguing that counsel should have called Dr. Daniel Foster at trial (App.Br.80). It is not clear whether appellant would have called him in lieu of or in addition to Dr. Back=s testimony at trial. Appellant argues that Dr. Back=s testimony was not persuasive because she only testified to Aless than half the story@ and because she only testified generally regarding the tests results and did not tie her results to facts of the case

(App.Br.62-63).

At the hearing, appellant presented the testimony of Dr. Foster, a forensic psychologist trained in neuropsychology (PCRTR.177). Dr. Foster was given all of the records to review that appellant now argues should have been given to Dr. Back . He also had the benefit of reviewing the trial transcript (PCRTR.188). Dr. Foster reviewed Lawrence County and Jasper County jail records, (M.Ex.8), Nevada State Hospital records, (M.Ex.7), Purdy school records, (M.Ex.12), Dr. Back=s raw data, (M.Ex.21), Dr. Morse=s report, all of the psychological evaluations in the Social Security file, (M.Ex.4), Freeman Hospital Records (where appellant sought treatment for alcohol abuse), police reports, and Department of Correction records (PCRTR.183-189). In addition, Dr. Foster had telephone contact with Dr. Morse, and he personally met and interviewed appellant=s family and friends (PCRTR.189).

To the extent appellant claims counsel should have presented Dr. Foster as a witness at trial because he feels Dr. Back=s testimony was not persuasive, appellant=s claim would fail. The motion court held as follows with respect to this claim:

> The record in this case reveals that Dr. Bettye Back was experienced and well-qualified in her field as a neuropsychologist (Tr. 1537-1600). Dr. Michael Morris was also retained as an expert and testified at trial on Movant's behalf regarding the Movant's brain injury and his opinion that Movant's behavior was affected by the injury (Tr. 1617-1623) Dr. Morris' testimony and medical findings were consistent witih Dr. Back's opinions.

Movant's trial counsel was not ineffective for retaining and utilizing two qualified expert witnesses for Movant's defense other than Dr. Foster. Trial counsel was not ineffective in failing to inquire of, locate and retain Dr. Daniel Foster or another expert witness.

(PCRLF.144) (internal citations omitted).

The motion court was correct. Rhoades contacted two experts to evaluate appellant and presented them at trial. Merely because now, upon hindsight, appellant feels that another expert would have done a better job, it does not establish that appellant was incompetent for using the experts that he did ultimately use at trial. Where as here, trial counsel makes a reasonable effort to investigate defendant=s mental status, counsel is not ineffective for not finding an expert who would testify a particular way. **State v. Chambers**, 891 S.W.2d 93, 113 (Mo.banc 1994), **cert. denied** 498 U.S. 950 (1990). Trial counsel was under no duty to shop for an expet witness. **State v. Copeland**, 928 S.W.2d 828 (Mo.banc 1996), **cert. denied** 519 U.S. 1126 (1997).

To the extent appellant argues that counsel was ineffective for failing to call Dr. Foster because his testimony would have contained more details and information based on the records and Aanecdotal@ evidence from lay witnesses discussed earlier in this Point, appellant=s claim would still fail. As explained above, with respect to the information that he asserts should have been forwarded to Dr. Back or another expert such as Dr. Foster, such evidence would have gone against counsel=s reasoned trial strategy and/or would not have been helpful at trial.

Appellant=s related claim that because Dr. Back did not have the records she could not present evidence of appellant=s other closed head injuries also fails. Counsel stated that he did not want her to bring up other head injuries because he wanted the jury to focus on the 1972 saw mill injury. He thought this was important since he had the MRI to show the jury concrete evidence of appellant=s injury. It would also be against Rhoades= trial strategy. The reason appellant received that head injury was because appellant assaulted a police officer in 1965, before his sawmill injury (PCRTR.477).

Also, even if Dr. Foster potential testimony that appellant had not received cognitive rehabilitation therapy in 1972 when he had his accident could have been helpful, appellant still has not established that such testimony would have changed the outcome of the trial. Again, in light of the evidence presented in both the guilt and penalty phases, it cannot be said that the jury would have found him not guilty, convicted him of a lesser offense or sentenced him to life without parole had the jury heard that appellant had previously had other closed head injuries and that he did not have cognitive rehabilitation therapy.

Taking away the additional information Dr. Foster was able to testify about that came from appellant=s Social Security records, Nevada State Hospital records, Purdy school records, and from the lay witnesses, the core of Dr. Foster=s testimony is quite similar to Dr. Back=s testimony at trial.[3] As the motion court noted with respect to this issue:

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[3]Dr. Back gave deposition testimony for appellant=s post-conviction claim (M.Ex.1). She explained what information was given to her for the trial and then she went on to testify

about what she found useful from the additional evidence that was supplied to her for purposes of the post-conviction claim (M.Ex.1 at 122-124,M.Ex.31). This additional evidence was all the evidence that appellant now claims should have been given to her for his trial. Again, such information was strategically not provided to her by counsel.

Dr. Foster's testimony was largely repetitive of the testimony of Dr. Bettye Back's trial testimony. He reviewed her neurological testing records and diagnosed Movant with dimentia [sic]. He also testified that in his opinion Movant did not deliberate at the time of the shooting in November, 1996. Dr. Foster did not perform any tests on Movant.

The Court finds that Dr. Foster's testimony concerning his opinion on Movant's mental state or "lack of deliberation" was repetitive of testimony offered at trial by Drs. Back and Morris [sic].

The Court finds that Dr. Foster's testimony and opinions were not credible and would not have been persuasive to the jury in either the guilt phase or the penalty phase of the trial. His testimony relies on Movant's self report and interviews with pesons who did not testify to Movant's allegations in the evidentiary hearing: Movant's family, Martha Ball and Connie Clayton and is inconsistent with many of the facts in the trial record. Dr. Foster's opinions that there was no motive for the homicide, that Movant was "more a product of our failed mental health system" than a cirminal, and "that it is easy to armchair quarterback in regards to capital cases" are irrelevant, inadmissible at trial and biased. Dr. Foster based his opinion that Movant did not form the intent and deliberation for first degree murder by stating that "a pure act of rage with intent would likely have resulted in six bullets in the officer" instead of one and he believed that the homicide would not have occurred but for the

> alcohol ingested by Movant. Dr. Foster's testimony does not provide a viable defense for Movant. His opinions regarding Movant's emotional state at the time of the offense is speculative and largely based on Movant's self-serving report three years after the crime, two years after the trial and is inconsistent with the trial testimony in this case.

(PCRL.F.136-138) (internal citations omitted).

Dr. Foster=s testimony is similar to Dr. Back=s testimony at trial in the manner in which he goes over the test results from the Halstead-Reitan Battery of tests that she conducted on appellant in July 1997 (PCRTR.193-214). He also diagnosed appellant with dementia, as Dr. Back had done in 1997, and he explained that as a result appellant becomes aggressive (PCRTR.191, 256). Their testimony is also similar in explaining how executive functions are affected when there is frontal lobe injury (PCRTR. 251). Dr. Foster also opines, as did Dr. Back, that appellant was incapable of deliberating at the time of the murder (PCRTR.363-364). Dr. Foster also explains how the events that followed the shooting, wherein appellant sought to solicit an alibi from Martin Cole and how he confessed to the killing, illustrate appellant=s poor judgment and his inability to plan, organize, or be rational (PCRTR.369).

Because Dr. Foster=s testimony, after taking away the information gleaned from the information that was not part of counsel trial strategy, was largely cumulative to testimony already presented at trial, counsel cannot be held ineffective for failing to call him at trial. **State v. Clay**, 975 S.W.2d at 145; **State v. Richardson**, 923 S.W.2d at 329 Furthermore,

the motion court did not find Dr. Foster=s testimony to be credible. As mentioned earlier in the Point, it is not likely that had Dr. Foster been called to testify at trial, that the outcome of the trial would have been different. In light of the evidence of deliberation standing in stark contrast to appellant=s claim that he could not plan or control his behavior, it is not likely that a jury would have given weight to Dr. Foster=s evidence, even if it had the additional information appellant argues should have been presented at trial.

Appellant=s reliance on **Williams v. Taylor**, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where defense counsel was found ineffective for failing to conduct a thorough investigation of the defendant=s background is misplaced (App.Br.94). In **Williams**, the defense did not begin preparing for penalty phase until a week before trial. **Id**. at 1514. The attorneys failed to conduct an investigation that would have uncovered the defendant=s Anightmarish childhood,@ including the fact that the defendant=s parents had been imprisoned for the criminal neglect of the defendant and his siblings, that the defendant had been severely and repeatedly beaten by his father, that the defendant had been committed to the custody of the social services for two years, that the defendant had been placed in an abusive foster home, that the defendant was Aborderline mentally retarded@ and did not advance beyond sixth grade, and that appellant had aided the police in breaking up a drug ring in prison. **Id**. The defense attorneys also failed to return the telephone call of a favorable witness who offered to testify on appellant=s behalf. **Id**. Moreover, at trial, the only mitigating argument advanced by counsel was that the defendant Aturned himself in, alerting police to a crime they otherwise would never had discovered, expressing remorse for his

actions, and cooperating with the police after that.@ **Id**. at 1515.

There was some other purportedly mitigating evidence presented in **Williams**, but it consisted of the defendant=s mother and two neighbors (one of which was pulled from the court audience without ever being interviewed beforehand) who testified that the defendant was a Anice boy@ and not violent. **Id**. at 1500. There was Apsychiatric@ evidence consisting of only a tape-recorded excerpt of psychiatrist relating how the defendant had told him that Aint hte ocurse of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone.@ **Id**.

In contrast to the **Williams** case, appellant=s counsel took reasonable and sufficient steps to investigate appellant=s childhood and mental history. Counsel and his daughter, who acted as second chair, interviewed appellant=s family members, either in person or on the telephone, and they obtained a comprehensive evaluation of appellant=s mental status (PCRTR.733).

Conclusion

Although there were certainly some details and information from all of these reports and lay witnesses that could have been helpful in support of appellant=s diminished capacity and mitigation defenses, there were also harmful details. Whether or not different attorneys might have decided to present the evidence is not the issue. It is whether appellant=s trial counsel acted reasonably and competently or whether his actions fell below an objective standard of reasonableness. **Strickland v. Washington**, 466 U.S. at 687-688. Here, counsel called two expert witnesses and appellant=s brother in support of his

diminished capacity defense. He called another brother and two other witnesses during the penalty phase to testify about appellant=s background, good behavior in jail, his religious activities and how he is helping his fellow inmates in prison. He strategically chose to keep the mental health issue simple for the jury. He wanted to avoid a paper shuffling war amidst 679 pages of records from appellant=s Social Security file, Nevada State Hospital file, and Purdy School records. Furthermore, his strategy entailed keeping out information of appellant=s high strung, aggressive nature before his 1972 accident. This was reasonable.

Also, appellant did not establish prejudice. The motion court did not find Dr. Foster=s testimony to be credible nor did the court find that the records or lay testimony would have made a difference at trial. As a result, appellant=s second point on appeal must fail.

III.

THE MOTION COURT WAS NOT CLEARLY ERRONEOUS IN DENYING APPELLANT'S RULE 29.15 MOTION, BASED UPON THE CLAIM THAT HIS TRIAL COUNSEL FAILED TO ADJUDICATE APPELLANT'S ALLEGED INCOMPETENCY TO PROCEED AT TRIAL BECAUSE COUNSEL MADE A REASONABLE AND STRATEGIC DECISION NOT TO CONTEST APPELLANT'S COMPETENCY TO PROCEED BASED UPON HIS CONCLUSION THAT APPELLANT UNDERSTOOD THE PROCEEDINGS AGAINST HIM AND COULD ASSIST IN HIS DEFENSE, AND APPELLANT COULD NOT HAVE BEEN PREJUDICED BY THIS DECISION IN THAT HE WAS IN FACT COMPETENT TO PROCEED.

Appellant alleged in his Rule 29.15 motion that his attorney was ineffective because he did not request a court-ordered examination to determine appellant=s competency to stand trial, ' 552.020, RSMo 2000, and that appellant was incompetent to proceed under that standard (PCR.LF.69). Specifically, appellant claims that his trial counsel was ineffective for not adjudicating his competency to stand trial after having had knowledge of the following:

(1) the Adebilitating@ head injury appellant received in a 1972 sawmill accident;

(2) appellant=s history of mental illness;

(3) appellant=s heavily medicated condition before and during trial;

(4) a recommendation by a Lawrence County jail physician=s assistant that appellant

undergo a psychological examination

(App.Br.96).

Evidence Presented to the Motion Court

In support of his claim, appellant presented the testimony of Dr. Daniel Foster who, in addition to testifying as described in Point II above, stated that in his opinion appellant was not competent to stand trial (PCRTR.359). He found that due to the mental illness he found in appellant, he was unable to Aconsistently@ assist or cooperate with this attorney as to trial strategy or trial process (PCRTR.398). Appellant did not understand the concept of mitigation or understand the different degrees of homicide (PCRTR.325,336). Dr. Foster stated that appellant engaged in Amagical thinking@ because he kept saying that the Lord will help him out (PCRTR.336). Dr. Foster based his opinion on his interview with appellant and on the medical records supplied to him by motion counsel (PCRTR.416).

Dr. Foster did acknowledge that appellant understood the role of the parties; the judge, prosecutor, defense attorney and the jury (PCRTR.327-328,455). Appellant knew he was facing the death penalty and understood the concept of deliberation and that he had a right to testify (PCRTR.400,456). During his interview with Dr. Foster, appellant remembered that the gun and bullet found after the shooting did not match and that no gun residue or blood splatter was found on his person (PCRTR.405). He recalled that the issue of gun residue found on Martin Cole was presented at trial (PCRTR.406). He believed that appellant had Aa fine relationship with Mr. Rhoades@ (PCRTR.456).

Jeffrey Tichenor, a physician=s assistant at the Lawrence County jail, testified that

from January 1997 to March 1997, he treated and prescribed various medications to appellant including Lorazepam, Chlorpromazine, Prednisone, and Meclizine (PCRTR.508,511-515,521). He said that appellant complained of anxiety while he was there and he noted that appellant had a Aflat affect@ and a depressed mood (PCRTR.517,519). He diagnosed appellant with possible schizophrenia (PCRTR.520). On March 11, 1997, Tichenor called trial counsel, Ross Rhoades, and told him about appellant=s problems and recommended that appellant receive a psychological examination (PCRTR.528,530). After he asked Rhoades about an exam for appellant, Rhoades told him he felt it would be better for appellant=s case if they selected a psychiatrist of their own choosing at a later date (PCRTR.527). Tichenor acknowledged that appellant was prescribed these medications at his own request (PCRTR.535). Dr. Bettye Back, the neuropsychologist who was retained by trial counsel, testified in a deposition that she did not recall if she was told to assess appellant=s competency to stand trial (Mov.Ex.1. at 10). Dr. Back stated that she had previously dealt with issues regarding competency to stand trial in other cases (Mov.Ex.1. at 72). Dr. Back stated that she would have told Rhoades and the court if she felt that appellant was not competent to proceed (Mov.Ex.1. at 77-78). She stated that appellant was competent to stand trial and able to assist his counsel with his defense (Mov.Ex.1. at 77). She stated that appellant was not Amentally retarded@ or Aactively psychotic@ (Mov.Ex.1.at77). She recalled from the intake evaluation she conducted with appellant that he was cooperative (Mov.Ex.1. at 79).

Pat Berrigan met with appellant in jail just after the case had been assigned to him in

early 1997 and before appellant retained Rhoades (PCRTR.635). At that initial interview, appellant gave Berrigan a great deal of information regarding his family (PCRTR.678-679, *see* St.EX. E). Appellant knew the date of his preliminary hearing and told Berrigan that he wanted a change of judge because he did not like the judge who was assigned to him (PCRTR.678). Appellant also asked him about obtaining a mental evaluation (PCRTR.683). Berrigan stated that appellant=s answers to his questions made sense to him and he felt that appellant was able to assist him in gathering information (PCRTR.680-681). Berrigan also acknowledged that the public defenders in the capital division had a practice of obtaining private forensic mental evaluations without going to court and requesting funds under Chapter 552 (PCRTR.695). Their view is that private experts will not write a report that could be discovered by the state and therefore, Anot helpful evidence@ could be kept from the state (PCRTR.695-696,700).

Rhoades also testified at the evidentiary regarding this matter. He stated that during his previous representation of a client facing the death penalty, he had requested a comptency examination for his client (PCRTR.928). However, when he previously represented appellant in a 1992 assault, he did not request a competency exam as he believed that appellant was competent to proceed (PCRTR.929). Although Rhoades initially testified that he did not ask Dr. Back to evaluate appellant=s competency to stand trial, he later stated that he asked Dr. Back to notify him if there were problems with competency (PCRTR.891,967). To his knowledge, Dr. Back thought appellant was competent to proceed (PCRTR.967).

Rhoades recalled being contacted by Tichenor from the Lawrence County jail, but he did not remember Tichenor recommending that appellant be evaluated (PCRTR.892). He acknowledged that during appellant=s time in the Lawrence County jail, he was either overmedicated or undermedicated and that appellant=s attention span fluctuated (PCRTR.893-894). He noted, however, that appellant did better while he was being held in the Jasper County jail (PCRTR.895). Rhoades presumed that he knew what medications appellant was taking during trial (PCRTR.893). Rhoades believed that despite the medications appellant had been taking, he could reasonably and rationally assist him in preparing his defense (PCRTR.952).

Although Rhoades acknowledged that appellant exhibited some paranoia, Rhoades stated that appellant did not manifest anxiousness and he had Ano more than your average problem remembering things@ (PCRTR.896). Rhoades did not see any signs from appellant that he could not communicate (PCRTR.954). He discussed each aspect of the case with appellant and appellant asked questions regarding the case (PCRTR.897). Rhoades went over the verdict directors with appellant and told him what elements the state had to prove at trial (PCRTR.937).

Rhoades explained how appellant wanted to pursue a mental health defense and seek changes of venue and judge and how appellant wrote about such in letters written to Rhoades prior to trial (PCRTR.897,935;St.EX. H,I,J,L). They discussed the different counties available to them and agreed on Jasper County (PCRTR.936-937). Rhoades described the Agive and take@ discussions he had with appellant regarding the evidence and discovery in the

case (PCRTR.939). Christine Rhoades testified that appellant had some Ainput about witnesses- both after and before they testified@ (PCRTR.815).

Rhoades also noted that when the state requested a mental evaluation under '' 552.020 and 552.030, RSMo 2000, he objected and wrote in his opposition motion that appellant could assist with the defense (PCRTR.952-953). Rhoades testified that nothing in the conversations he had with appellant indicated that appellant could not understand the proceedings against him or help him with the defense (PCRTR.939). If there had been such indications, Rhoades would have sent appellant to obtain a competency evaluation (PCRTR.939).

Appellant Did Not Receive Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, a movant must establish by a preponderance of the evidence that his or her attorney made errors so grievous that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the errors committed denied the defendant a trial whose result was reliable. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial review of counsel's conduct is necessarily done in hindsight and must therefore be highly deferential, and the competence of counsel is "strongly presumed." **Id**., 466 U.S. at 689-690; *see also* **State v. Harris**, 870 S.W.2d 798, 814 (Mo. banc 1994), **cert. denied** 115 S.Ct. 371 (1994). On an appeal from the denial of a postconviction motion, the ruling of the lower court will be overturned only if it is "clearly erroneous." Supreme Court Rule 29.15(j). Findings of fact and conclusions of law are clearly

erroneous only if, after a review of the entire record, the appellate court is left with the definite and firm impression that a mistake has been made. **State v. Taylor**, 929 S.W.2d 209, 224 (Mo. banc 1996).

1. The Reasonableness of Counsel's Actions

On the issue of whether the actions of Rhoades "fell below an objective standard of reasonableness," **Strickland v. Washington**, **supra**, 466 U.S. at 687-688, the motion court found as follows:

> Attorney Ross Rhodes fully investigated Movant's mental status in the underlying criminal case by having two experts, Dr. Back and Dr. Morris, examine and test the Movant . . . Attorney Ross Rhodes[sic] testified that, in his opinion, the Movant was competent to stand trial. He based his opinion on his previous knowledge of the Movant in a prior felony criminal representation, and his extensive discussions with and correspondence from Movant about this particular case. Attorney Rhodes has been handling criminal cases since the 1970's. He knows the Missouri law regarding competency to stand trial and has utilized it in the past. Movant, though not highly educated, understood the charges against him and assisted in his own defense.
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> ***
>
> . . .Attorney Ross Rhodes was aware of Movant's previous medical history and head injury. He sought and obtained neuropsychological

examintaion for Movant by Dr. Bettye Back. He recalled discussing competency with Dr. Back, and it was not an issue. Nothing in Movant's behavior, correspondence, or discussions indicated to him that Movant was not competent. Attorney Rhodes opposed a State's Motion for Mental Evaluation because he "saw no signs" Movant was not competent . . . Movant wrote correspondence to his counsel discussing the charge, evidence, defense strategy and the penalty he faced and received (St.Ex. H, I, J, K, L) . . . Dr. Back's interview with Movant clearly demonstrated he knew the nature of the charges against him, who he was charged with killing, and that it was first degree murder and a serious charge (P. 1 at 80-82). Movant was cooperative (P.1 at 79).

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. . .Trial counsel Ross Rhodes testified that based on his extensive dealings with Movant, he believed Movant understood the proceedings against him and that the was able to assist him. Dr. Back's evaluation fully supported the conclusion that Movant was competent. Counsel's performance was not deficient . . . Trial counsel testified he made a strategic decision to retain outside expertise and not use the same experts that appear regularly. Movant's own witness, Patrick Berrigan, explained the strategic reasons why an attorney chooses not to utilize Section 552.020 and instead obtain an outside evaluator. (PCRLF.148,149, 150,151) (internal citations omitted). The motion court was not clearly

erroneous.

In order to establish ineffective assistance of counsel for failing to request a court-ordered mental examination under ' 552.020, RSMo 2000, arguing that appellant was not competent to proceed at trial, appellant Amust show the existence of a factual basis indicating a questionable mental condition that should have caused his attorney to initiate an independent investigation of appellant=s mental state.@ **State v. Richardson**, 923 S.W.2d 301, 328 (Mo.banc 1996), **cert. denied** 519 U.S. 972 (1996); *see also* **State v. Skelton**, 887 S.W.2d 699, 706 (Mo.App. S.D. 1994). AThe need for an investigation is not indicated where the accused has the present ability to consult rationally with counsel and to understand the proceedings.@ **Richardson**, **supra** at 328.

In attacking the motion court's ruling as "clearly erroneous," appellant simply ignores the evidence that supports the findings of the court. Appellant ignores the evidence cited above of his own active and rational participation in his defense--affirmatively demonstrating his understanding of the proceedings against him and his ability to assist counsel--as well as the adverse testimony of Dr. Back and Pat Berrigan stating that appellant was competent to stand trial. Instead, appellant points to jail records and testimony from Tichenor to argue that counsel should have known appellant was incompetent due to his actions in jail and the medication that was prescribed to him while in jail. However, appellant=s use of anti-depressant and anti-anxiety medication before and during trial do not alone demonstrate that trial counsel should have requested a Chapter 552 mental examination. *See* **Green v. State**, 792 S.W.2d 15, 17 (Mo.App. E.D. 1990) (where no

evidence that the strong medication ingested by the defendant impaired his ability to understand the proceedings or affect guilty plea); *See also* **Walker v. Gibson**, 228 F.3d 1217, 1230-1231 (10th Cir. 2000) (where the defendant submitted jail medical records showing that he was taking anti-psychotic medications at the time of trial in support of his ineffective assistance claim and the court held that there still had to be evidence that the Petitioner was unable to rationally help with his defense).

Even if there was evidence of appellant having problems with his medication, Rhoades stated that the problem with appellant=s medication occurred while he was in the Lawrence County Jail and that he was fine once he was transferred to the Jasper County Jail in March 1997 (PCRTR.512, L.F.2). Appellant=s trial was in October 1997 (LF.8). Thus, Rhoades believed appellant=s problems with medications had been controlled from March 1997 to the time of trial in October 1997.

Appellant also argues that appellant should have raised the competency issue because of indications in appellant=s social security file that appellant had a long history of mental illness stemming from his sawmill accident (App.Br.98). He points to Drs. Foster=s and Back=s testimony in further support of his claim. However, A[t]he suspicion or actual presence of some degree of mental illness or need for psychiatric treatment does not equate with incompetency to stand trial . . .In fact, an accused may be mentally retarded in some degree and still be competent to stand trial . . .@ **Hubbard v. State**, 31 S.W.3d 25, 34 (Mo.App. W.D. 2000). *See also* **State v. Moore**, 1 S.W.3d 586, 589 (Mo.App. E.D. 1999) (Acommitment to a mental hospital for observation and diagnosis does not per se . . . make a

defendant incompetent to stand trial); **State v. Petty**, 856 S.W.2d 351, 354 (Mo.App. S.D. 1993); **State v. Frezzell**, 958 S.W.2d 101, 104 (Mo.App. W.D. 1998).

Here, Rhoades was more than aware of appellant=s sawmill accident injury. He had reviewed appellant=s social security file and retained Drs. Back and Morse to conduct a neuropsychological evaluation of appellant. Also, Rhoades had represented appellant five years prior in an assault case. Armed with his knowledge, Rhoades believed appellant was competent to proceed at trial. Rhoades testified that nothing in the conversations he had with appellant indicated that appellant could not understand the proceedings against him or help him with the defense (PCRTR.939). ADefense counsel is often in the best position to determine whether a defendant=s competency is questionable.@ **Walker v. Gibson**, 228 F.3d at 1228. Defense attorneys must, of necessity, rely upon their perception of their client in deciding whether there is any question of whether the defendant is able to Aunderstand the proceedings against him or to assist in his own defense.@ Section 552.021.1.

Appellant also does not discuss the court=s finding that trial counsel=s decision not to seek a mental evaluation was strategic. Trial counsel explained why he had made that decision, and the court found in accordance with that testimony (PCRLF.151). Given that Rhoades believed appellant was competent to stand trial, it was not unreasonable for counsel to make a strategic decision not to seek a competency evaluation for appellant. In fact, not only did he not seek to request the exam, but when the state requested a mental evaluation under '' 552.020 and 552.030, RSMo 2000, he affirmatively *objected* to such

an evaluation and wrote in his opposition motion that appellant could assist with the defense (PCRTR.952-953, L.F.6). This decision was not unreasonable given the substantial downside for the defense as the defense would have no control over the examiner, the prosecutor would receive the results, and the contents of the report could be damaging to the accused.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." **Strickland v. Washington**, **supra**, 466 U.S. at 690; *see also* **State v. Kreutzer**, 928 S.W.2d 854, 877 (Mo.banc 1996), **cert. denied** 117 S.Ct. 752 (1997). Trial counsel Rhoades conducted an extensive investigation of appellant's mental history, and concluded from the facts before him that appellant was able to understand the proceedings against him and to assist in his defense. The motion court correctly found that his actions were reasonable.

2. The Absence of Prejudice to Appellant

Appellant's attack upon his attorneys and upon the ruling of the motion court rests upon his allegation that he was in fact incompetent to proceed at the time of his trial.[4] If

[4]Appellant=s claim that he was denied due process because he Awas tried convicted, and sentenced even though he lacked the capacity to understand the proceedings against him and assist in his own defense, due to a mental defect@ is not cognizable in post-conviction relief proceedings because it is a claim of trial court error that could have been raised on direct appeal (PCRLF.69). **State v. Owens**, 759 S.W.2d 73, 75 (Mo.App. S.D. 1988);

appellant was correct, he would certainly have satisfied the "prejudice" element of **Strickland v. Washington**, **supra**. If, on the other hand, appellant was not incompetent, he obviously could not demonstrate that, but for counsel's errors, a reasonable probability exists that the result of his trial would have been different. **Strickland v. Washington**, **supra**, 466 U.S. at 694.

The motion court's factual findings on this issue are as follows:

State v. Tilden, 988 S.W.2d 568, 575 (Mo.App. W.D. 1999) (where the due process claim was raised on direct appeal) . The post-conviction relief rules cannot be used to obtain review of matters that could have been raised on direct appeal. **State v. Six**, 805 S.W.2d 159, 168 (Mo.banc 1991); **State v. Hunter**, 840 S.W.850,860 (Mo.banc 1992). Movant did not allege facts in his Rule 29.15 motion showing that any extraordinary circumstances existed that precluded him from raising this claim in his direct appeal. In fact, he alleged that reasonable counsel would have been aware of the matters in question (PCRLF.73).

Dr. Foster testified that he examined and interviewed Movant on January 8, 2000, approximately two years after Movant's trial. He opined that Movant was not competent to stand trial in 1997, and was not competent to assist his appellate counsel . . . His opinions are not credible, and inconsistent with the record in this case. He performed no intellectual functioning tests and relied on movant's self-serving statements in forming his opinion that Movant was and is not competent.

***

Ross Rhodes[sic] testified that Movant was well aware what he was charged with, and the possible penalties. They discussed the evidence, and a psychological defense. He provided Movant with a copy of the discovery in the case. Movant had his own bank account, his own home and paid for his own legal services. Ross Rhodes testified that Movant trusted him and that he "has always been able to communicate" with Movant.

***

Dr. Back's interview with Movant clearly demonstrated he knew the nature of the charges against him, who he was charged with killing, and that it was first degree murder and a serious charge (P. 1 at 80-82). Movant was cooperative (P.1 at 79). Movant provided detailed information about his family history, own history, alcohol use, law enforcement experience and criminal history (P.1 84, 85) (P.; Exhibit No. 10). She noted his long term

memory was good . . . Movant was coherent, responsive, oriented, testable, and not psychotic (P. 1 at 85, 89, 90, 91). While Dr. Back's opinion was that Movant could not deliberate for first degree murder, she did believe he was competent to stand trial.

***

This Court notes that the record is devoid of any behavior or actions by Movant that would have required the Court to order a competency evaluation on its own Motion. This Court sustained Movant=s pre-trial motion to prohibit another evaluation of Movant at the State=s request . . .When addressed by the Court during his murder trial, the Movant responded in a reasonable and rational manner. (TM. at 1822, 1880-1883). There is nothing bizarre about the crime itself to suggest that Movant was incompetent to stand trial.

(PCRLF.147,149,150,151,152) (Internal citations omitted).

These factual findings by the motion court are amply supported by the testimony of Dr. Back, Rhoades, Berrigan, (PCRTR.1022-1069), and by appellant's extensive participation in his own defense, as cited above.

Appellant's attack upon the motion court's findings is simple: the court believed the "wrong" witnesses, and should instead have credited the opinion of Dr. Foster to the exclusion of other witnesses and evidence (App.Br.106). However, the weight and credibility to be afforded the testimony of witnesses is a matter for the motion court, and appellate courts have rightly deferred to that court's opportunity to view and hear these

witnesses. **Hubbard v. State**, 31 S.W.3d at 34; **State v. Simmons**, 955 S.W.2d 729, 747 (Mo.banc 1997), **cert. denied** 522 U.S. 1129 (1998) (where the motion court found one doctor=s testimony as to the defendant=s competency to stand trial not credible and this Court gave deference to the finding).

The brief of appellant makes no attempt to address these credibility findings by the motion court, and they are amply supported by the record. No basis exists for a "definite and firm impression that a mistake has been made," **State v. Taylor**, **supra**, 929 S.W.2d at 224, and the court's holding is therefore not clearly erroneous.

Because trial counsel reasonably decided not to request a Chapter 552 mental exam for appellant as he believed appellant was competent to proceed after having hired two mental health professionals to evaluate appellant, and because appellant was, in fact, competent to proceed, appellant third point on appeal must fail.

IV.

THE MOTION COURT DID NOT CLEARLY ERR WHEN IT DENIED APPELLANT'S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON THE GROUND THAT HIS TRIAL COUNSEL DID NOT CALL VARIOUS FAMILY MEMBERS AND FRIENDS, CAROLYN DORSEY, ARNOLD RAY EVANS, LES PAUL, NORMA MITCHELL, AND DELORES WILLIAMS AS MITIGATION WITNESSES IN THE PENALTY PHASE OF THE TRIAL BECAUSE APPELLANT FAILED TO PROVE THAT HIS COUNSEL ACTED UNREASONABLY AND APPELLANT WAS NOT PREJUDICED IN THAT SUCH TESTIMONY FROM THE PROPOSED WITNESSES WOULD HAVE BEEN CUMULATIVE TO THE TESTIMONY AND/OR HARMFUL TO THE THEORY PRESENTED AT TRIAL.

During the penalty phase, counsel called appellant's younger brother, Jerry Clayton, who testified about appellant's work history and the value of appellant's life to his family and elderly mother (Tr.1797-1799,1802). He also testified about the changes he saw in

appellant after his head injury in the 1972 sawmill accident (Tr.1799,1800). Counsel presented additional evidence from Thora Shaw, the Chaplain in the Jasper County Jail, possessed sincere religious beliefs, was a good influence on other inmates and was remorseful for his crime (Tr.1806,1808-1811, 1813). Captain Jeffrey Carr of the Jasper County Jail also testified about the medications appellant was taking during trial and stated that he did not have any problems with appellant (Tr.1795).

Appellant claims that he received ineffective assistance of counsel because his trial counsel did not call additional family members and friends, Carolyn Dorsey, Arnold Ray Evans, Les Paul, Norma Mitchell, and Delores Williams as mitigation witnesses in the penalty phase of the trial (App.Br.108). Appellant argues that had the witnesses been called at trial, there is a reasonable probability that the outcome of the penalty phase would have been different (App.Br.108).

The Evidentiary Hearing

1. Carolyn Dorsey and Les Paul

The substance of Carolyn Dorsey=s and Les Paul=s testimony at the evidentiary hearing has been discussed in Point 2 above. In sum, Dorsey, appellant=s sister, testified about their poor background, their parents and her father=s strictness, appellant=s alcohol problems, and appellant=s religious conversion and activities after the sawmill accident (PCRTR.18-87). Paul testified about the following: appellant=s religious activities, seeing appellant preach and sing, changes in appellant after the sawmill injury, and seeing appellant assault his daughter=s boyfriend (PCRTR.90-151).

2. Arnold Ray Evans

Arnold Ray Evans, a pastor, testified at the hearing that he has known appellant since 1970 (PCRTR.602-603). He has seen appellant preach at his church (PCRTR.608). After the 1972 accident, he noticed that appellant was depressed and started drinking (PCRTR.612,614). He believed that appellant would continue to minister his faith and help fellow inmates in prison (PCRTR.618). He also praised appellant=s singing talent (PCRTR.618). He stated that he was not contacted by Rhoades and he was willing to testify on appellant=s behalf (PCRTR.620-621).

3. Norma Mitchell

Norma Mitchell=s testimony was taken at a deposition in lieu of testifying at the hearing (M.Ex.3 at 3,4). She stated that she was appellant=s neighbor and that she used to live 3/4 of a mile away from appellant (M.Ex.3 at 3,4). She stated that appellant was a good neighbor and that he split wood and moved a stove for her when her husband could not do so and whenever she called for help (M.Ex.3 at 6). Appellant came once a week to bring her tomatoes from his garden (M.Ex.3 at 7). She stated that when she ran a guest home for elderly people and unwed mothers in the 1970's, appellant came with his wife and children to preach and sing to her guests (M.Ex.3 at 7-10).

Mitchell stated that during appellant=s trial she was constant in contact with appellant=s mother (M.Ex.3 at 12). She said a lawyer did come out to talk to her and that she would have testified for appellant (M.Ex.3 at 12). Mitchell also stated that she heard appellant acted bad when he drank (M.Ex.3. at 12).

4. Delores Williams

Delores Williams testified at the hearing that appellant was a good neighbor who helped elderly people (PCRTR.546-548). He helped dig out tree stumps, cut trees, built her front porch, brought fruit from his garden, and sang to her husband when he was ill (PCRTR.550-557). She considered appellant to be a religious man who studied the bible (PCRTR.555). She stated that she did not get a call from Rhoades and would have testified on appellant=s behalf (PCRTR.563).

5. Trial Counsel

Ross Rhoades testified that he did not remember any of the witnesses except Carolyn Dorsey (PCRTR.902, 912). He stated that he talked on the phone with appellant=s neighbor who lived to the west of him (PCRTR.912). He stated that he did not recall why he chose to call appellant=s brothers Michael and Jerry over the other family members and friends (PCRTR.984). He assumes it was because their testimony was consistent with his trial strategy of presenting evidence of appellant=s change in behavior after 1972 and not before the accident (PCRTR.984). He worried that if other witnesses had been subject to a rigorous cross-examination, they would have had to testify about Avolatile acts@ prior to 1972 (PCRTR.985). He thought bringing in the prior acts would confuse the jury or dilute the effectiveness of his doctor=s testimony (PCRTR.985). Christine Rhoades testified that both she and her father had a meeting with appellant=s family members and appellant=s mother=s house (PCRTR.733).

Appellant Did Not Receive Ineffective Assistance of Counsel

Review of the motion court's findings of fact and conclusions of law is for clear error. Supreme Court Rule 29.15 (k); **State v. Parker**, 886 S.W.2d 908, 929 (Mo. banc 1994), **cert. denied** 514 U.S. 1098 (1995). A motion court's findings and conclusions are clearly erroneous only if, after a review of the entire record, the appellate court is left with the definite impression that a mistake has been made." *Id*.

To prevail on a claim of ineffective assistance of counsel, a movant must establish: (1) that his attorney's performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced. **Strickland v. Washington**, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The selection of witnesses are matters of trial strategy. **State v. Clay**, 975 S.W.2d 121, 143 (Mo. banc 1998),cert. denied, 119 S.Ct 834 (1999); **State v. Davis**, 965 S.W.2d 927, 931 (Mo.App., W.D. 1998). Strategic choices made after thorough investigation are virtually unchallengeable. **State v. Davis**, 965 S.W.2d at 931.

The motion court found that the testimony of Dorsey, Evans, Paul and Williams was cumulative to Marvin and Jerry Clayton=s and Thora Shaw=s testimony at trial (PCRLF.155,156,157,159). Furthermore, the motion court found that appellant had not established that Dorsey=s, Mitchell=s and Williams= testimony would have changed the outcome of the penalty phase (PCRLF.155,158,159).

The motion court did not clearly err in denying appellant's claims of ineffective assistance of counsel for failure to present appellant's proposed character witnesses. Counsel has a duty to make a reasonable investigation of possible mitigating evidence or to

make a reasonable decision that such an investigation is unnecessary. **State v. Harris**, 870 S.W.2d 798, 815 (Mo. banc 1994), **cert. denied** 115 S.Ct. 371 (1994). Counsel's presentation of penalty-phase evidence is a matter of professional judgment. **State v. Clemons**, 946 S.W.2d 206, 223 (Mo. banc 1997), **cert. denied** 118 S.Ct. 416 (1997). "Defense counsel is under no obligation to present the defendant's background in mitigation in a death penalty case, and defense counsel certainly need not present cumulative evidence of his background." **State v. Clay**, 975 S.W.2d at 145; **State v. Richardson**, 923 S.W.2d 301, 329 (Mo. banc 1996), **cert. denied** 117 S.Ct. 403 (1996).

Here, counsel testified that they interviewed appellant=s family and friends and at least one of the neighbors (PCRTR.146, 733,908, 912). Furthermore, as to Paul, Rhoades stated that Paul could not help appellant (PCRTR.150). As argued in Point II above, the record shows that as counsel felt that Paul would not have helped appellant, he was not ineffective for failing to pursue him as a witness. If counsel believes that the witnesses' testimony would not unqualifiedly support the defense, the decision whether to call the witness is a matter of trial strategy that will not support a finding of ineffective assistance of counsel. **State v. Jones**, 885 S.W.2d 57, 58 (Mo.App., W.D. 1994); *see also* **State v. Dixon**, 969 S.W.2d 252, 258 (Mo.App., W.D. 1998). Further, Paul admitted that he distrusted Rhoades and was not cooperative. Appellant=s claim as to Leslie Paul fails. Also, as discussed in Point II, Dorsey=s testimony would have brought out unsavory characteristics about appellant that Rhoades wanted to keep out at trial (PCRTR. 69,988).

Appellant argues that he was prejudiced by his counsel's decision not to call his

proposed witnesses at trial because the witnesses would have provided persuasive mitigating testimony (App.Br.108). However, trial counsel did present three witnesses who were able to testify about positive aspects of appellant's behavior.

Appellant argues that he needed to have more witnesses testify regarding appellant=s religious activities because the issue of his religious beliefs was in serious dispute, so the issue needed to be corroborated (App.Br. 125). Even if the prosecutor questioned appellant=s beliefs in closing argument, it can hardly be said that the issue was in serious dispute. Counsel called three witnesses who testified regarding appellant=s religious beliefs; his brothers Marvin and Jerry and jail chaplain, Thora Shaw. There was no evidence presented by the state contradicting their testimony. Thus, there was no need to have additional witnesses in order to corroborate the issue and therefore, additional testimony on the subject would indeed have been cumulative.

Furthermore, evidence regarding appellant=s singing talents were already testified to by Thora Shaw who also witnessed appellant sing in jail. In addition testimony from appellant=s neighbors demonstrating how helpful he can be is similar to the testimony from Ms. Shaw wherein she testified about how appellant was helpful to his fellow inmates in jail. Thus, evidence of appellant=s helpfulness and singing talents were already presented before the jury.

"Failing to present cumulative evidence is not ineffective assistance of counsel." **State v Johnston**, 957 S.W.2d 734, 755 (Mo. Banc 1997), **cert. denied** 522 U.S. 1150 (1998). *See also* **State v. Kinder**, 942 S.W.2d 313, 336 (Mo. banc 1996), **cert. denied**

522 U.S. 854 (1997), **State v. Clay**, 975 S.W.2d 121, 145 (Mo.banc 1998) **cert. denied** 119 S.Ct. 834 (1999), **State v Taylor**, 929 S.W.2d 209, 224 (Mo. banc 1996) **cert. denied** 519 U.S. 1152 (1997) (all cases where this Court held that the appellant did not receive ineffective assistance of counsel for failure to present cumulative mitigation evidence during the penalty phase of a capital trial).

Appellant was not prejudiced by the actions of his counsel in that the testimony of his proposed witnesses that appellant argues he needed in mitigation was primarily already before the jury at trial. Furthermore, as discussed in Point II, in light of the evidence the state presented at trial in the guilt and penalty phase, it cannot be said that had defense counsel presented these witnesses at the penalty phase that the jury would have sentenced appellant to life without parole. Thus, based on the foregoing, appellant's fourth point on appeal must fail.

CONCLUSION

For the foregoing reasons, the judgment of the motion court should be affirmed.

Very truly yours,

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CERTIFICATE OF COMPLIANCE AND SERVICE:

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this __ day of September, 2001, to:

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